This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

**Usage guidelines**

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

**About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW

# Transcript Appeals.

## Vol. 6.

THE

# FILE OF OPINIONS

IN CASES ARGUED BEFORE THE

# COURT OF APPEALS

OF THE

# STATE OF NEW YORK,

DURING THE

MARCH TERM,

1868.

FROM OFFICIAL COPIES CERTIFIED BY

JOEL TIFFANY, State Reporter.

SECOND EDITION WITH ANNOTATIONS BY

JAMES G. GREENE,

ROCHESTER, N. Y.

ROCHESTER, N. Y.

WILLIAMSON LAW BOOK COMPANY, PUBLISHERS,

1907

Entered according to Act of Congress, in the year
nineteen hundred and seven, by
WILLIAMSON LAW BOOK COMPANY,
in the office of the Librarian of Congress, Washington, D. C.

LRR
OCT 5 1931
1045/31

# JUDGES OF THE COURT OF APPEALS.

1868.

---

| | |
|---|---|
| *Judges of the Court of Appeals.* | WILLIAM B. WRIGHT, Chief Judge in January.<br>WARD HUNT, CHIEF JUDGE after January.<br>MARTIN GROVER.<br>LEWIS B. WOODRUFF.<br>CHARLES MASON, after January, in place of Judge Wright. |
| *Justices of the Supreme Court.* | THOMAS W. CLERKE,<br>THEODORE MILLER.<br>WILLIAM J. BACON.<br>HENRY WELLES. |

# TABLE OF CASES REPORTED

## IN VOLUMES I TO VI.


A

VOL. PAGE

Abeel *v.* Van Gelder.....II. 99
Adams *v.* Fort Plain Bank..II. 234
Adams, Kellogg *v.*.....VI. 282
Adler, Pfeifer *v.*.....IV. 95
Adsit, Lee *v.*.....IV. 336
Allen, Hoxie *v.*.....VI. 223
Allen, Mattice *v.*.....III, 263
Allen *v.* Sackrider.....IV. 396
Allen, Whitehead *v.*.....III. 258
American Bible Society, Harris *v.*.....IV. 485
American Mutual Life Ins. Co., Gibson *v.*.....V. 262
Andrews, Gates *v.*.....V. 176
Angle, Shibley *v.*.....V. 246
Anthony, Mason *v.*.....III. 255
Armitage *v.* Pulver.....V. 186
Artisans' Bank *v.* Backers...I. 75
Artisans' Bank, Lake *v.*.....I. 71
Atlantic Dock *v.* City of Brooklyn .....III. 305
Atlantic Mutual Insurance Company, Taylor *v.*.....IV. 279
Attorney-General *v.* Dutch Reformed Church .....II. 145
Aubrey *v.* Fiske.....I. 245

B

Babcock, Smith *v.*.....I. 307

VOL. PAGE

Backers, Artisans' Bank *v.*...I. 75
Bacon *v.* Burnham.....V. 210
Bacon, Troy Fire Department *v.*.....II. 222
Baker *v.* Bliss.....VI. 346
Baldwin, Fulton Fire Ins. Co. *v.*.....V. 180
Baldwin *v.* Van Duesen.....V. 18
Ballard, Hosford *v.*.....VI. 296
Ballin *v.* Dillaye.....IV. 69
Bank of Auburn *v.* Putnam..I. 322
Bank of Fox Lake, Turner *v.*II. 344
Bank of New York *v.* Supervisors of New York...IV. 136
Bank of the State of Indiana *v.* Bugbee.....III. 243
Banks, Griffin *v.*.....V. 160
Barker *v.* White.....III. 86
Barnes, Cook *v.*.....II. 39
Barney *v.* Worthington.....IV. 105
Barrie, People *v.*.....IV. 76
Barringer *v.* Hammond.....IV. 115
Barringer, Van Rensselaer *v.*VI. 150
Barry, Slocum *v.*.....V. 173
Bartholick, Merrit *v.*.....I. 63
Bartlett *v.* Robinson.....VI. 159
Barton *v.* City of Syracuse...I. 317
Baskin *v.* Baskin.....II. 14
Bass *v.* Comstock.....V. 22
Bates *v.* Rosekrans.....IV. 332

VOL. PAGE

Baudouine *v.* Hart.....v. 267
Beach *v.* Raritan & Del. Bay R. R. Co.....v. 113
Beals *v.* Home Insurance Co.ii. 25
Beardsley Scythe Co. *v.* Foster .....iii. 215
Belloni, Milburn *v.*.....vi. 343
Benedict *v.* De Groot.....iii. 66
Bennett, People *v.*.....iv. 32
Betts, Chatham Bank *v.*.....iv. 400
Betts, Curtis *v.*.....iv. 40
Beyer, Till *v.*.....vi. 142
Bingham *v.* Disbrow.....v. 198
Binsse *v.* Wood.....v. 42
Bird *v.* Steamboat Josephine.vi. 5
Blanchard, Champney *v.*.....vi. 53
Bleakley, Emerson *v.*.....ii. 171
Bleakley, Emerson *v.*.....iii. 100
Bliss, Baker *v.*.....vi. 346
Bliven *v.* Hudson River R. R. Co.....ii. 179
Blossom *v.* Burritt.....v. 36
Blydenburgh *v.* Thayer.....i. 221
Board of Assessors of the City of Brooklyn, Citizens' Gas Light Co. of Brooklyn *v.*.....vi. 116
Bolt, Dillingham *v.*.....iv. 110
Bond, Conkey *v.*.....ii. 200
Boppe, Holtze *v.*.....v. 110
Boston Carpet Company *v.* Journeay .....ii. 250
Bowen, Hardman *v.*.....vi. 323
Bradley, Van Bergen *v.*.....ii. 295
Bradner, Hicks *v.*.....v. 239
Brady, Devlin *v.*.....ii. 271
Brand *v.* Focht.....ii. 357
Brandreth, People *v.*.....i. 10
Brayton, McCabe *v.*.....vi. 227
Briggs, Radway *v.*.....iv. 98
Brill, Doughty *v.*.....iii. 326

VOL. PAGE

Brisbane, Moss *v.*.....iii. 7
Broadway Bank, Van Blarcom *v.*.....v. 132
Bronner *v.* Frauenthal.....iv. 116
Brookfield *v.* Remsen.....iv. 278
Brooklyn City and Newtown R. R. Co., Sheridan *v.*.....i. 49
Brooklyn City, Atlantic Dock Co. *v.*.....iii. 305
Brooklyn, City of, Orr *v.*....iii. 278
Brouwer, Gill *v.*.....v. 86
Brown, Paine *v.*.....iv. 195
Brown *v.* Penfield.....ii. 196
Brown, Rockwell *v.*.....i. 278
Brown, Stewart *v.*.....iv. 502
Brown *v.* Vaughan.....i. 348
Brown *v.* Weber.....vi. 94
Bruce *v.* Davenport.....iii. 82
Bruff *v.* Mali.....i. 96
Brush *v.* Lee.....i. 66
Brush *v.* Lee.....ii. 95
Buckminister *v.* Thompson..ii. 355
Buffalo, N. Y. & Erie R. R. Co., Howe *v.*.....iv. 249
Bugbee, Bank of the State of Indiana *v.*.....iii. 243
Bunnell, Merchant *v.*.....iii. 35
Burnett *v.* Phalon .....iii. 167
Burnham, Bacon *v.*.....v. 210
Burritt, Blossom *v.*.....v. 36
Bush, Union Bank *v.*.....iii. 235
Buswell *v.* Poineer .....iv. 245
Button *v.* McCauley.....iv. 447
Butts *v.* Wood.....iv. 432

C

Cagger *v.* Dolan.....i. 118
Campbell, Watson *v.*.....vi. 335
Candee *v.* Haywood.....v. 194
Canter *v.* People.....ii. 1
Carbeau, Flora *v.*.....vi. 231

VOL. PAGE
Carman, Maher *v*.....v. 25
Carrington *v*. Crocker.....iv. 230
Carter, Roberts *v*.....vi. 253
Case *v*. Hotchkiss.....i. 285
Casey *v*. Janes.....v. 327
Cassin *v*. Delany.....vi. 199
Cawley, Owen *v*.....iii. 270
Cazet *v*. Hubbell.....iii. 333
Central R. R. Co., New York, Plate *v*.....v. 165
Chamberlain *v*. Dempsey.....i. 257
Champney *v*. Blanchard.....vi. 53
Chatham Bank *v*. Betts.....iv. 400
Cisco *v*. Roberts.....i. 297
Citizens. Gas Light Co. of Brooklyn *v*. Board of Assessors of the City of Brooklyn .....vi. 116
City Building and Loan Co. *v*. Fatty.....iv. 311
City of Buffalo, Howell *v*....iv. 505
City of Buffalo, Read *v*.....iii. 79
City of Poughkeepsie, Swift *v*. .....iii. 196
City of Poughkeepsie, Swift *v*. .....v. 221
City of Rochester, Monroe Co. Savings Bank *v*.....iv. 473
City of Syracuse, Barton *v*....i. 317
Claflin, Huntington *v*.....vi. 168
Clark *v*. Eighth Avenue R. R. Co. .....i. 105
Clark *v*. Ford.....i. 22
Clark, Johnson *v*.....vi. 138
Clark, Lawrence *v*.....i. 231
Clark, Scranton *v*.....vi. 132
Clarke *v*. Tunnicliff.....v. 268
Clemens *v*. Clemens.....iv. 50
Coffin *v*. Reynolds.....v. 74
Coghlan *v*. Dinsmore.....iv. 386
Cohn, Tobias *v*.....i. 346
Colburn *v*. Morton.....i. 145
Coleman *v*. Second Ave. R. R. Co. .....vi. 146

VOL. PAGE
Columbia Ins. Co. *v*. Stevens..v. 9
Columbian Insurance Co., Swinnerton *v*.....iv. 159
Colwell *v*. Lawrence.....v. 307
Coman, Pratt *v*.....v. 334
Commercial Bank of Clyde *v*. Marine Bank.....i. 302
Commissioners of Highways, Thomas *v*.....iv. 358
Comstock, Bass *v*.....v. 22
Conger, Story *v*.....iii. 211
Conkey *v*. Bond.....ii. 200
Cook *v*. Barnes.....ii. 39
Cook *v*. Meeker.....i. 31
Cook *v*. New York Central R. R. Co.....iii. 8
Corn Exchange Fire & Inland Ins. Co., Savage *v*....iii. 112
Cornen, Westfield Bank *v*...iv. 442
Cornwell *v*. Wooley.....ii. 380
Cott *v*. Lewiston R. R. Co....i. 26
Covert, New York Life Ins. and Trust Co. *v*.....iii. 24
Craig, Husted *v*.....i. 331
Craig *v*. Ward.....ii. 281
Crocker, Carrington *v*.....iv. 230
Curran *v*. Warren Chemical and Manufacturing Co.....i. 59
Curtis *v*. Betts.....iv. 404
Curtiss *v*. Howell.....vi. 290

## D

Dann *v*. Williams.....ii. 277
Davenport, Bruce *v*.....iii. 82
Davenport *v*. Ruckman.....v. 254
Davis *v*. Duffy.....iii. 5
Davis *v*. Keyes.....v. 352
Davis *v*. Morris.....iii. 226
Davis, People *v*.....i. 8
Davison, Pitt *v*.....iv. 266
Day, Douglass *v*.....ii. 190

VOL. PAGE

Day *v.* Saunders.....I. 352
De Beerski *v.* Page.....II. 371
Decker *v.* Lee.....II. 248
Dederick, Fitch *v.*.....IV. 192
De Groot, Benedict *v.*.....III. 66
De Groot, Osgood *v.*.....II. 86
Delafield *v.* De Grau.....III. 49
Delany, Cassin *v.*.....VI. 199
Del Vecchio *v.* Supervisors of Kings Co.....IV. 390
Dempsey, Chamberlain *v.*.....I. 257
Depuy *v.* Strong.....IV. 239
Deshler, Rawls *v.*.....III. 91
Devlin *v.* Brady.....II. 271
Devoy *v.* Mayor, &c., of New York .....II. 377
De Witt, Westerlo *v.*.....II. 332
Dillaye, Ballin *v.*.....IV. 69
Dillenbeck, Waffle *v.*.....V. 241
Dillingham *v.* Bolt.....IV. 110
Dingledein *v.* Third Ave. R. R. Co.....V. 155
Dinsmore, Coghlan *v.*.....IV. 386
Dinsmore, Rosebrooks *v.*.....I. 265
Disbrow, Bingham *v.*.....V. 198
Dissosway *v.* Winant.....II. 192
Diven *v.* Lee.....I. 54
Dolan, Cagger *v.*.....I. 118
Doughty *v.* Brill.....III. 326
Douglass *v.* Day.....II. 190
Douglass, Ormsby *v.*.....V. 100
Dow *v.* Sixth Avenue Railroad Company .....II. 246
Driscoll *v.* Newark and Rosendale Lime Co.....V. 82
Duncan *v.* Great Western Ins. Co. .....II. 130
Dunham *v.* Troy Union R. R. Co. .....III. 67
Dunham *v.* Williams.....IV. 209
Dutch Reformed Church,

VOL. PAGE

Attorney-General *v.*.....II. 145

E

Eaddie, Wiltsie *v.*.....IV. 481
Edgerton *v.* N. Y. & Harlem R. R. Co.....VI. 248
Eighth Avenue R. R. Co., Clark *v.*.....I. 105
Eighth Avenue R. R. Co., Maverick *v.*.....II. 125
Eighth Avenue R. R. Co., Traver *v.*.....III. 203
Elias *v.* Farley.....II. 116
Ely, Lawrence *v.*.....V. 128
Ely *v.* Norton.....II. 221
Ely *v.* Supervisors of Niagara Co. .....I. 273
Emerson *v.* Bleakley.....II. 171
Emerson *v.* Bleakley.....III. 100
Empire Ins. Co., Rowley *v.*...III. 285
Ernst *v.* Hudson River R. R. Co.....VI. 35
Eveland *v.* Wheeler.....IV. 12
Exchange Fire Insurance Co., Mayor, &c., of New York *v.*.....III. 206
Eycleshimer, Stover *v.*.....III. 290

F

Farley, Elias *v.*.....II. 116
Farmers and Mechanics' Bank *v.* Joslyn.....IV. 308
Farmers and Mechanics' Bank *v.* Parker.....IV. 302
Farnham *v.* Mallery.....III. 171
Fatty, City Building and Loan Co. *v.*.....IV. 311
Fay *v.* O'Neil.....I. 185
Ferguson, People *v.*.....V. 347
Ferris, Robinson *v.*.....I. 19
Ferris *v.* Union Ferry Co....I. 313
Fiedler *v.* Mead.....I. 109
Fielden *v.* Lahens.....III. 218

VOL. PAGE

First National Bank of Selma, Tracy *v*..... 14
Fiske, Aubrey *v*.....I. 245
Fitch *v*. Dederick.....IV. 192
Fitzgerrold *v*. People.....V. 273
Fitzhugh, Williams *v*.....V. 61
Fleet, Wood *v*.....II. 257
Flora *v*. Carbeau.....VI. 231
Focht, Brand *v*.....II. 357
Ford, Clark *v*.....I. 22
Fort Plain Bank, Adams *v*...II. 234
Forward, Northwestern Ins. Co. *v*.....I. 167
Foster, Beardsley Scythe Co. *v*.....III. 215
Foster *v*. Van Wyck.....III. 196
Fountain *v*. Pettee.....VI. 241
Frauenthal, Bronner *v*.....IV. 116
Freeman, Slocum *v*.....II. 303
Fulton Fire Ins. Co. *v*. Baldwin .....V. 180

G

Gardiner *v*. Tyler.....III. 161
Gates *v*. Andrews.....V. 176
Gibert *v*. Peteler.....VI. 329
Gibson *v*. American Mutual Life Ins. Co.....V. 262
Gibson *v*. Haggarty.....V. 143
Gill *v*. Brouwer.....V. 86
Golden, Hudler *v*.....II. 316
Good, Robert *v*.....II. 103
Goodrich, Ranger *v*.....III. 303
Goodwin *v*. Nelin.....IV. 369
Gordon *v*. Hostetter.....IV. 375
Gould, Howell *v*.....II. 360
Gould, Vandervoort *v*.....III. 59
Gram *v*. Prussian Emigrated Evangelical Luth. German Society .....III. 339
Gray, Ratcliffe *v*.....III. 117

VOL. PAGE

Great Western Ins. Co., Duncan *v*.....II. 130
Greene *v*. White.....IV. 382
Green, Wait *v*.....II. 340
Green, Waters *v*.....II. 346
Griffin *v*. Banks.....V. 160
Grosvenor *v*. N. Y. Central R. R. Co.....VI. 311
Guernsey *v*. Guernsey.....II. 151

H

Haggarty, Gibson *v*.....V. 143
Halsey, Stevens *v*.....IV. 261
Hamilton Fire Ins. Co., The Mayor, &c., of New York *v*. .....VI. 244
Hamilton, Livermore *v*.....VI. 219
Hamilton *v*. Medbury.....III. 333
Hamilton *v*. Wright.....V. 1
Harbeck *v*. Mayor, &c., of New York .....II. 377
Hardman *v*. Bowen.....VI. 323
Harris *v*. American Bible Society, .....IV. 485
Harrison *v*. Harrison.....II. 348
Hart, Baudouine *v*.....V. 267
Hartshorne *v*. Union Mutual Ins Co.....I. 189
Hasbrouck *v*. Kingston Board of Education.....III. 105
Hatch *v*. Pryor.....III. 317
Hatters' Bank *v*. Phillips....VI. 302
Haviland *v*. Hayes.....IV. 214
Hayward *v*. Liverpool Fire and Life Ins. Co.....III. 180
Hayward, Candee *v*.....V. 194
Heister *v*. Metropolitan Board of Health.....VI. 170
Heister, Metropolitan Board of Health *v*.....VI. 170
Hendricks *v*. Stark.....IV. 146

VOL. PAGE

Henry *v.* Wilkes.....v. 204
Hicks *v.* Bradner.....v. 239
Hinnemann *v.* Rosenback...vi. 257
Hoe *v.* Sanborn.....i..160
Hogan *v.* Hoyt.....iv. 409
Holtze *v.* Boppe.....v. 110
Home Ins. Co., Beals *v.*.....ii. 25
Home Ins. Co., Wall *v.*.....i. 324
Hosford *v.* Ballard.....vi. 296
Hostetter, Gordon *v.*.....iv. 375
Hotchkiss, Case *v.*.....i. 285
Howe *v.* Buffalo, N. Y. & Erie R. R. Co.....iv. 249
Howell *v.* City of Buffalo...iv. 505
Howell, Curtiss *v.*.....vi. 290
Howell *v.* Gould..... ii. 360
Howell *v.* Huyck..... iv. 202
Hoxie *v.* Allen.....vi. 223
Hoyt, Hogan *v.*.....iv. 409
Hubbell, Cazet *v.*.....iii. 333
Hubbell, Sawyer *v.*.....iii. 333
Hudler *v.* Golden.....ii. 316
Hudson River R. R. Co., Bliven *v.*.....ii. 179
Hudson River R. R. Co., Ernst *v.*.....vi. 35
Hudson R. Steamboat Co., Milton *v.*.....iv. 252
Hunt *v.* Michigan S. & N. Indiana R. R. Co.....iv. 103
Hunt, Thomas *v.*.....iii. 191
Huntington *v.* Claflin.....vi. 168
Husted *v.* Craig.....i. 331
Huyck, Howell *v.*.....iv. 202
Hyde *v.* Lathrop.....iii. 320

I

Irving Bank *v.* Wetherald...ii. 120
Ives, Tompkins *v.*.....i. 266

J

Jacobs *v.* Remsen.....iii. 129

VOL. PAGE

Janes, Casey *v.*.....v. 327
Jenkins *v.* Wheeler.....iv. 450
Jervis, Parker *v.*.....i. 88
Johnson *v.* Clark.....vi. 138
Johnson, People *v.*.....v. 299
Joslyn, Farmers and Mechanics' Bank *v.*.....iv. 308
Journeay, Boston Carpet Company *v.*.....ii. 250

K

Kasson, Ohio and Mississippi R. R. Co. *v.*.....iv. 184
Kellogg *v.* Adams.....vi. 282
Kelly, Mittnacht *v.*.....ii. 342
Kelsey *v.* King.....i. 133
Kelsey *v.* Ward.....v. 318
Kelsey, Ward *v.*.....v. 315
Kelsey, Wells *v.*.....iv. 328
Kennedy *v.* People.....vi. 19
Ketaltas, Stewart *v.*.....ii. 288
Ketchum, N. Y. & N. H. R. R. Co. *v.*.....i. 116
Keyes, Davis *v.*.....v. 352
King, Kelsey *v.*.....i. 133
King *v.* Mayor, &c., of New York .....i. 288
King *v.* Platt.....iv. 19
King, Vrooman *v.*.....ii. 107
Kings County Fire Insurance Co., Pindar *v.*.....iii. 330
Kingsland, Noel *v.*.....i. 270
Kingston Board of Education, Hasbrouck *v.*.....iii. 106
Kunzmuller, Martin *v.*.....iv. 464

L

Lacoste, Lanchantin *v.*.....iv. 154
Lahens, Fielden *v.*.....iii. 218
Lake *v.* Artisans' Bank.....i. 71
Lane, Schneider *v.*.....iii. 266
Lanergan *v.* People.....vi. 84

VOL. PAGE

Lansing, People *v*.....v. 96
Lathrop, Hyde *v*.....iii. 320
Law, Secor *v*.....iii. 328
Lawrence *v*. Clark.....i. 231
Lawrence, Colwell *v*.....v. 307
Lawrence *v*. Ely.....v. 128
Laytin, Osgood *v*.....iii. 124
Lee *v*. Adsit.....iii. 336
Lee, Brush *v*.....i. 96
Lee, Brush *v*.....ii. 95
Lee *v*. Decker.....ii. 248
Lee, Diven *v*.....i. 54
Leroy *v*. Park Fire Ins. Co...vi. 316
Leroy, Van Kleek *v*.....iv. 295
Lewis *v*. Mott.....ii. 36
Lewis, People *v*.....iii. 1
Lewiston R. R. Co., Cott *v*...i. 26
Livermore *v*. Hamilton.....vi. 219
Liverpool Fire and Life Ins. Co., Hayward *v*.....iii. 180
Lobdell *v*. Lobdell.....ii. 363
Lorillard *v*. Silver.....iii. 143
Lowman *v*. Yates.....v. 320
Lyman *v*. Wilbour.....ii. 302
Lyon *v*. Mitchell.....ii. 47

M

Macdonald, Winne *v*.....vi. 207
Maher *v*. Carman.....v. 25
Main *v*. Miles.....i. 287
Mali, Bruff *v*.....i. 96
Mallery, Farnham *v*.....iii. 171
Mallory *v*. Tioga R. R. Co. i. 203
Marine Bank, Commercial Bank of Clyde *v*.....i. 302
Marshall, Western Transportation Co. *v*.....iv. 366
Martin *v*. Kunzmuller.....iv. 464
Martin *v*. Smith.....i. 25
Mason *v*. Anthony.....iii. 255

VOL. PAGE

Mattice *v*. Allen.....iii. 263
Maverick *v*. Eighth Avenue R. R. Co.....ii. 125
Mayor, &c., of New York, Devoy *v*.....ii. 377
Mayor, &c., of New York *v*. Exchange Fire Insurance Co. .....iii. 206
Mayor, &c., of New York *v*. Hamilton Fire Ins. Co....vi. 244
Mayor, &c., of New York Harbeck *v*.....ii. 377
Mayor, &c., of New York, King *v*.....i. 288
Mayor, &c., McCotter *v*.....iv. 435
Mayor, &c., National Broadway Bank *v*.....iv. 124
Mayor, &c., of New York, Smith *v*.....v. 228
Mayor, &c., *v*. Ryan.....iv. 363
Mayor, &c., of New York, Whiting *v*.....vi. 192
McCabe *v*. Brayton.....vi. 227
McCauley, Button *v*.....iv. 447
McClelland *v*. Remsen.....iii. 182
McCluer, Parker *v*.....i. 240
McClure *v*. Supervisors of Niagara Co. .....iv. 275
McCotter *v*. Mayor, &c.....iv. 435
McIntyre *v*. New York Central R. R. Co.....iv. 1
McKee *v*. People.....i. 1
McKibbin *v*. Peck.....vi. 69
McLaren *v*. McMartin.....i. 226
McMartin, McLaren *v*.....i. 226
McMullen *v*. Shepard.....iii. 353
Mead, Fiedler *v*.....i. 109
Mechanics' Bank of City of New York *v*. Straiton.....i. 201
Medbury, Hamilton *v*.....iii. 333
Medbury, Putnam *v*.....iii. 333
Meeker, Cook *v*.....i. 31

VOL. PAGE
Melvin *v.* Wood.....III. 297
Merchant *v.* Bunnell.....III. 35
Merritt *v.* Bartholick.....I. 63
Metcalf, Patrick *v.*.....IV. 235
Metropolitan Board of Health, Heister *v.*.....VI. 170
Metropolitan Board of Health *v.* Heister.....VI. 170
Michigan S. and N. Indiana R. R. Co., Hunt *v.*.....IV. 103
Milburn *v.* Belloni.....VI. 343
Miller, Tomlinson *v.*.....III. 250
Milton *v.* Hudson R. Steamboat Co. .....IV. 252
Minot, Peck *v.*.....IV. 27
Mitchell, Lyon *v.*.....II. 47
Mittnacht *v.* Kelly.....II. 342
Monroe Co. Savings Bank *v.* City of Rochester.....IV. 473
Morange, Morris *v.*.....VI. 1
Morgan, Sanderson *v.*.....VI. 308
Moring, People *v.*.....IV. 522
Morris Canal & Banking Co., Townsend *v.*.....VI. 266
Morris, Davis *v.*.....III. 226
Morris *v.* Morange.....VI. 1
Morris *v.* Ward.....III. 148
Morss, Ritchmyer *v.*.....I. 355
Moss *v.* Brisbane.....III. 7
Mott, Lewis *v.*.....II. 36
Mott *v.* Union Bank.....IV. 291
Mott, Willis *v.*.....II. 61
Munn, Worrall *v.*.....VI. 100
Murray, Ogden *v.*.....VI. 129

N

Nash *v.* People.....II. 209
National Broadway Bank *v.* Mayor, &c. .....IV. 124
Nelin, Goodwin *v.*.....IV. 369
Newark and Rosendale Lime Co., Driscoll *v.*.....V. 82
VOL. PAGE
Newell *v.* Wheeler.....II. 160
Newkirk *v.* N. Y. & Harlem R. R. Co.....VI. 196
New York & Harlem R. R. Co., Edgerton *v.*.....VI. 248
New York & Harlem R. R. Co., Newkirk *v.*.....VI. 196
New York & N. H. R. R. Co. *v.* Ketchum.....I. 116
New York Central R. R. Co., Cook *v.*.....III. 8
New York Central R. R. Co., Grosvenor *v.*.....VI. 311
New York Central R. R. Co., McIntyre *v.*.....IV. 1
New York Central R. R. Co., Plate *v.*.....V. 165
New York Central R. R. Co., Perrin *v.*.....I. 253
New York Central R. R. Co., Renwick *v.*.....I. 46
New York Central R. R. Co., Wilson *v.*.....II. 298
New York Life Ins. and Trust Co. *v.* Covert.....III. 24
Niles, Main *v.*.....I. 287
Noel *v.* Kingsland.....I. 270
Norris, Sandford *v.*.....I. 350
Northrop *v.* Syracuse, B. and N. Y. R. R. Co.....II. 183
Northrup *v.* People.....IV. 177
Northwestern Ins. Co. *v.* Forward .....I. 167
Norton, Ely *v.*.....II. 221

O

O'Brien *v.* People.....II. 5
O'Brien, People *v.*.....VI. 90
Ogden *v.* Murray.....VI. 129
Ohio and Mississippi R. R. Co. *v.* Kasson.....IV. 184

VOL. PAGE

Onderdonk *v.* Voorhis.....II. 41
O'Neil, Fay *v.*.....I. 185
Ormsby *v.* Douglass.....V. 100
Orr *v.* City of Brooklyn....III. 278
Orton *v.* Orton.....III. 18
Osborne *v.* Robbins.....II. 319
Osgood *v.* De Groot.....II. 86
Osgood *v.* Laytin.....III. 124
Owen *v.* Cawley.....III. 270

P

Paige, De Beerski *v.*.....II. 371
Paige *v.* Willet.....V. 27
Paige, Wright *v.*.....III. 134
Paine *v.* Brown.....IV. 195
Park Fire Ins. Co., Leroy *v.*..VI. 316
Parker, Farmers and Mechanics' Bank *v.*.....IV. 302
Parker *v.* Jervis.....I. 88
Parker *v.* McCluer.....I. 240
Parker, Shepard *v.*.....III. 361
Parshall, Tanner *v.*.....II. 204
Patchin *v.* Peck.....V. 33
Patrick *v.* Metcalf.....IV. 235
Patrick, Philbin *v.*.....V. 170
Peck *v.* Minot.....IV. 27
Peck, Patchin *v.*.....V. 33
Peck, McKibbin *v.*.....VI. 69
Penfield, Brown *v.*.....II. 196
People, Barrie *v.*.....IV. 76
People *v.* Bennett.....IV. 32
People *v.* Brandreth.....I. 10
People, Canter *v.*.....II. 1
People *v.* Davis.....I. 8
People *v.* Ferguson.....V. 347
People, Fitzgerald *v.*.....V. 273
People *v.* Johnson.....V. 299
People, Kennedy *v.*.....VI. 19
People *v.* Kingston Board of Education .....III. 160
People, Lanergan *v.*.....VI. 84
People *v.* Lansing.....V. 96

VOL. PAGE

People *v.* Lewis.....III. 1
People *v.* Moring.....IV. 522
People, Nash *v.*.....II. 209
People, Northrup *v.*.....IV. 177
People *v.* O'Brien.....II. 5
People *v.* O'Brien.. .....VI. 90
People *v.* Raymond.....V.. 233
People *v.* Tubbs.....V. 342
People, Tuttle *v.*.....II. 306
People *v.* Vilas.....I. 209
People *v.* Wentz.....IV. 513
Percy *v.* Ten Eyck.....III. 74
Perrin *v.* N. Y. Central R. R. Company .....I. 253
Peteler, Gibert *v.*.....VI. 329
Pettee, Fountain *v.*.....VI. 241
Pfeifer *v.* Adler.....IV. 95
Phalon, Burnett *v.*.....III. 167
Phelps *v.* Van Dusen.....IV. 399
Phillips *v.* Terry.....I. 235
Phillips *v.* Wooster.....II. 254
Phillips, Hatters' Bank *v.*...VI. 302
Philbin *v.* Patrick.....V. 170
Pindar *v.* Kings County Fire Ins. Co. .....III. 330
Pitt *v.* Davison.....IV. 266
Plate *v.* N. Y. Central R. R. Co. .....V. 165
Platt, King *v.*.....IV. 19
Poineer, Buswell *v.*.....IV. 245
Porter *v.* Ruckman.....VI. 65
Porter *v.* Spence.....VI. 44
Potter *v.* Van Vranken.....II. 73
Potter, Winfield *v.*.....V. 303
Pratt *v.* Coman.....V. 334
Prowitt *v.* Rodman.....IV. 412
Prussian Emigrated Evan. Luth. Ger. Soc., Gram *v.*..III. 339
Pryor, Hatch *v.*.....III. 317
Pulver, Armitage *v.*.....V. 186
Putnam, Bank of Auburn *v.*..I. 322
Putnam *v.* Medbury.....III. 333

R

VOL. PAGE
Radway *v.* Briggs.....IV. 98
Ranger *v.* Goodrich.....III. 303
Raritan & Del. Bay R. R. Co., Beach *v.*.....V. 113
Ratcliffe *v.* Gray.....III. 117
Rawls *v.* Deshler.....III. 91
Raymond, People *v.*.....V. 233
Read *v.* City of Buffalo.....III. 79
Redfield *v.* Tegg.....VI. 320
Remsen, Brookfield *v.*.....IV. 278
Remsen, Jacobs *v.*.....III. 129
Remsen, McClelland *v.*.....III. 182
Remsen, Richtmyer *v.*.....VI. 203
Renwick *v.* N. Y. Central R. R. Co.....I. 46
Reynolds, Coffin *v.*.....V. 74
Reynolds *v.* Reynolds.....I. 103
Rigney *v.* Savory.....III. 296
Ring *v.* Steele.....III. 46
Ritchmyer *v.* Morss.....I. 355
Ritchmyer *v.* Remsen.....VI. 203
Robbins, Osborne *v.*.....II. 319
Robert *v.* Good.....II. 103
Roberts *v.* Carter.....VI. 253
Roberts, Cisco *v.*.....I. 297
Robie *v.* Sedgwick.....V. 151
Robinson, Bartlett *v.*.....VI. 159
Robinson *v.* Ferris.....I. 19
Rockwell *v.* Brown.....I. 278
Rodman, Prowitt *v.*.....IV. 412
Rosebrooks *v.* Dinsmore.....I. 265
Rosekrans, Bates *v.*.....IV. 332
Rosenback, Hinnemann *v.*....VI. 257
Rowley *v.* Empire Ins. Co...III. 285
Ruckman, Davenport *v.*.....V. 254
Ruckman, Porter *v.*.....VI. 65
Ruckman, Sandford *v.*.....VI. 68
Ruckman, Ward *v.*.....I. 172
Russell *v.* Russell.....III. 183
Russell *v.* Winne.....V. 52
VOL. PAGE
Rutgers Fire Insurance Co., Sohns *v.*.....II. 227
Ryan, Mayor, &c., *v.*.....IV. 363

S

Sackrider, Allen *v.*.....IV. 396
St. Nicholas Ins. Co., Stringham *v.*.....I. 334
Sanborn, Hoe *v.*.....I. 160
Sanderson *v.* Morgan.....VI. 308
Sandford *v.* Ruckman.....VI. 68
Sanford *v.* Norris.....I. 350
Saunders, Day *v.*.....I. 352
Saunders, Wright *v.*.....I. 263
Savage *v.* Corn Exchange Fire and Inland Ins. Co...III. 112
Savory, Rigney *v.*.....III. 296
Sawyer *v.* Hubbell.....III. 333
Sawyer, Van Benthuysen *v.*..I. 206
Schneider *v.* Lane.....III. 266
Scranton *v.* Clark.....VI. 132
Seacord *v.* Warrin.....IV. 319
Second Ave. R. R. Co., Coleman *v.*.....VI. 146
Security Fire Ins. Co., Wolf *v.*.....VI. 286
Secor *v.* Law.....III. 328
Sedgwick, Robie *v.*.....V. 151
Seguine *v.* Seguine.....III. 308
Shaw *v.* Smith.....I. 238
Shelly, Williams *v.*.....IV. 314
Shepard, McMullen *v.*.....III. 354
Shepard *v.* Parker.....III. 361
Sheridan *v.* Brooklyn City & Newtown R. R. Co.....I. 49
Shibley *v.* Angle.....V. 246
Silver, Lorillard *v.*.....III. 143
Sixth Avenue Railroad Company, Dow *v.*.....II. 246
Sixth Avenue Railroad Company, Wolfkeil *v.*.....V. 217

VOL. PAGE

Sloan *v.* Van Wyck.....v. 98
Slocum *v.* Barry.....v. 173
Slocum *v.* Freeman.....ii. 303
Smith *v.* Babcock.....i. 307
Smith *v.* Martin.....i. 25
Smith *v.* Mayor, &c., of New York .....v. 228
Smith, Shaw *v.*.....i. 238
Smith *v.* Tracy.....iii. 345
Sohns *v.* Rutgers Fire Insurance Co. .....ii. 227
Spaulding *v.* Strang.....iv. 80
Spence, Porter *v.*.....vi. 44
Staiger *v.* Schultz.....iii. 4
Stark, Hendricks *v.*.....iv. 146
Steamboat Josephine, Bird *v.* .....vi. 5
Steele, Ring *v.*.....iii. 46
Stephens *v.* Halsey.....iv. 261
Stewart *v.* Brown.....iv. 502
Stewart *v.* Ketaltas.....ii. 288
Stevens, Columbia Ins. Co. *v.*..v. 9
Story *v.* Conger.....iii. 211
Stover *v.* Eycleshimer.....iii. 290
Straiton, Mechanics' Bank of City of New York *v.*....i. 201
Strang, Spaulding *v.*.....iv. 80
Stringham *v.* St. Nicholas Insurance Co. .....i. 334
Strong, Depuy *v.*.....iv. 239
Supervisors of Kings Co., Del Vecchio *v.*.....iv. 390
Supervisors of New York, Bank of New York *v.*....iv. 136
Supervisors of Niagara Co., Ely *v.*.....i. 273
Supervisors of Niagara Co., McCluer *v.*.....iv. 275
Swift *v.* City of Poughkeepsie .....v. 221
Swift *v.* City of Poughkeepsie .....iii. 196
Swinnerton *v.* Columbian Insurance Co. .....iv. 159

VOL. PAGE

Syracuse, B. and N. Y. R. R. Co., Northrop *v.*.....ii. 183

T

Tanner *v.* Parshall.....ii. 204
Taylor *v.* Atlantic Mutual Ins. Co. .....iv. 279
Tegg, Redfield *v.*.....vi. 320
Ten Eyck, Percy *v.*.....iii. 74
Terry, Phillips *v.*.....i. 235
Thayer, Bladenburgh *v.*.....i. 221
Third Ave. R. R. Co., Dingeldein *v.* .....v. 155
Thomas *v.* Commissioners of Highways of Milton.....iv. 358
Thomas *v.* Hunt .....iii. 191
Thompson, Buckminster *v.*..ii. 355
Till *v.* Beyer .....vi. 142
Tioga R. R. Co., Mallory *v.*..i. 203
Tobias *v.* Cohn.....i. 346
Tompkins *v.* Ives.....i. 266
Tomlinson *v.* Miller.....iii. 250
Townsend *v.* Morris Canal & Banking Co.....vi. 266
Tracy *v.* First National Bank of Selma .....v. 14
Tracy, Smith *v.*.....iii. 345
Traver *v.* Eighth Ave. R. R. Co. .....iii. 203
Trevor, Jr., *v.* Wood.....i. 248
Troy Fire Department *v.* Bacon .....ii. 222
Troy Union R. R. Co., Dunham *v.* .....iii. 67
Trustees, &c., Van Deuzen *v.*.iii. 39
Tubbs, People *v.*.....v. 342
Tunnicliff, Clarke *v.*.....v. 268
Turner *v.* Bank of Fox Lake.ii. 344
Tuttle *v.* People.....ii. 306
Tyler, Gardiner *v.*.....iii. 161

U

VOL. PAGE
Union Bank *v.* Bush.....III. 235
Union Bank, Mott *v.*.....IV. 291
Union Ferry Co., Ferris *v.*...I. 313
Union Mutual Ins. Co., Hartshorne *v.*.....I. 189

V

Van Benthuysen *v.* Sawyer...I. 206
Van Bergen *v.* Bradley.....II. 295
Van Blarcom *v.* The Broadway Bank .....V. 132
Vandervoort *v.* Gould .....III. 57
Vanderzee *v.* Vanderzee.....I. 92
Van Deusen, Baldwin *v.*.....V. 18
Van Deusen *v.* Trustees, &c..III. 39
Van Dusen, Phelps *v.*.....IV. 399
Vandusen *v.* Worrell.....I. 224
Van Gelder, Abeel *v.*.....II. 99
Van Kleeck *v.* Woodruff...III. 196
Van Kleek *v.* Leroy.....IV. 295
Van Rensselaer *v.* Barringer.VI. 150
Van Vranken, Potter *v.*....II. 73
Van Wyck, Foster *v.*.....III. 196
Van Wyck, Sloan *v.*.....V. 98
Vaughan, Brown *v.*.....I. 348
Vilas, People *v.*.....I. 209
Voorhis, Onderdonk *v.*.....II. 41
Vrooman *v.* King.....II. 107

W

Waffle *v.* Dillenbeck.....V. 241
Wait *v.* Green.....II. 340
Wall *v.* Home Insurance Co..I. 324
Ward, Craig *v.*.....II. 281
Ward, Kelsey *v.*.....V. 318
Ward *v.* Kelsey.....V. 315
Ward, Morris *v.*.....III. 148
Ward *v.* Ruckman.....I. 172
VOL. PAGE
Warren Chemical and Manufacturing Co., Currin *v.*...I. 59
Warrin, Seacord *v.*.....IV. 319
Waters *v.* Green.....II. 346
Watson *v.* Campbell.....VI. 335
Weber, Brown *v.*.....VI. 94
Wells *v.* Kelsey.....IV. 328
Wentz, People *v.*.....IV. 513
Westerlo *v.* De Witt.....II. 332
Western Transportation Co. *v.* Marshall .....IV. 366
Westfield Bank *v.* Cornen...IV. 442
Wetherald, Irving Bank *v.*..II. 120
Wheeler, Eveland *v.*.....IV. 12
Wheeler, Jenkins *v.*.....IV. 450
Wheeler, Newell *v.*.....II. 160
White, Barker *v.*.....III. 86
White, Greene *v.*.....IV. 382
Whitehead *v.* Allen.....III. 258
Whiting *v.* Mayor, &c., of New York .....VI. 192
Wilbour, Lyman *v.*.....II. 302
Willet, Paige *v.*.....V. 27
Williams *v.* Birch.....II. 133
Williams, Dann *v.*.....II. 277
Williams, Dunham *v.*.....IV. 209
Williams *v.* Fitzhugh.....V. 61
Williams *v.* Shelly.....IV. 314
Willis *v.* Mott.....II. 61
Wilkes, Henry *v.*.....V. 204
Wilson *v.* N. Y. Central R. R. Co. .....II. 298
Wiltsie *v.* Eaddie .....IV. 481
Winant, Dissosway *v.*.....II. 192
Winfield *v.* Potter.....V. 303
Winne *v.* Macdonald.....VI. 207
Winne, Russell *v.*.....V. 52
Wolf *v.* Security Fire Ins. Co. .....VI. 286
Wolfkeil *v.* Sixth Ave. R. R. Co. .....V. 217
Wood, Binsee *v.*.....V. 42
Wood, Butts *v.*.....IV. 432
Wood *v.* Fleet.....II. 257
Wood, Melvin *v.*.....III. 297

VOL. PAGE
Wood *v.* Trevor, Jr.....I. 248
Woodruff, Van Kleeck *v.*...III. 196
Wooley, Cornwell *v.*.....II. 380
Wooster, Phillips *v.*.....II. 254
Worrall *v.* Munn.....VI. 100
Worrell, Vandusen *v.*.....I. 224
Worthington, Barney *v.*.....IV. 105
VOL. PAGE
Wright, Hamilton *v.*.....V. 1
Wright *v.* Paige.....III. 134
Wright *v.* Saunders .....I. 263

Y

Yates, Lowman *v.*.....V. 320

# TABLE OF CASES REPORTED

## IN THIS VOLUME.


A

PAGE

Adams, Kellogg *v*..... 282
Allen, Hoxie *v*..... 223

B

Baker *v*. Bliss..... 346
Ballard, Hosford *v*..... 296
Barringer, Van Rensselaer *v*... 150
Bartlett *v*. Robinson..... 159
Belloni, Milburn *v*..... 343
Beyer, Till *v*..... 142
Bird *v*. Steamboat Josephine... 5
Blanchard, Champney *v*..... 53
Bliss, Baker *v*..... 346
Board of Assessors of the City of Brooklyn, Citizens' Gas Light Co. of Brooklyn *v*..... 116
Bowen, Hardman *v*..... 323
Brayton, McCabe *v*..... 227
Brown *v*. Weber..... 94

C

Campbell, Watson *v*..... 335
Carbeau, Flora *v*..... 231
Carter, Roberts *v*..... 253
Cassin *v*. Delany..... 199
Champney *v*. Blanchard..... 53
Citizens' Gas Light Co. of Brooklyn *v*. Board of Assessors of the City of Brooklyn. 116
Claflin, Huntington *v*..... 168
Clark, Scranton *v*..... 132
Clark, Johnson *v*..... 138
Coleman *v*. Second Ave. R. R. Co. ..... 146
Curtiss *v*. Howell..... 290

D

Delany, Cassin *v*..... 190

E

Edgerton *v*. N. Y. & Harlem R. R. Co..... 248
Ernst *v*. Hudson River R. R. Co. ..... 35

F

Flora *v*. Carbeau..... 231
Fountain *v*. Pettee..... 241

G

Gibert *v*. Peteler..... 329
Grosvenor *v*. N. Y. Central R. R. Co. ..... 311

H

Hamilton Fire Ins. Co., the Mayor, &c., of New York *v*.. 244
Hamilton, Livermore *v*..... 219
Hardman *v*. Bowen..... 323
Hatters' Bank *v*. Phillips..... 302
Heister *v*. Metropolitan Board of Health ..... 170
Heister, Metropolitan Board of Health *v*..... 170
Hinneman *v*. Rosenback..... 257
Hosford *v*. Ballard..... 296

PAGE

Howell, Curtiss *v.* ..... 290
Hoxie *v.* Allen..... 223
Hudson River R. R. Co., Ernst *v.* ..... 35
Huntington *v.* Claflin..... 168

J

Johnson *v.* Clark..... 138

K

Kellogg *v.* Adams..... 282
Kennedy *v.* People..... 19

L

Lanergan *v.* People..... 84
Leroy *v.* Park Fire Ins. Co.... 316
Livermore *v.* Hamilton..... 219

M

Macdonald, Winne *v.*..... 207
Mayor, &c., of New York *v.* Hamilton Fire Ins. Co..... 244
Mayor, &c., of New York, Whiting *v.*..... 192
McCabe *v.* Brayton..... 227
McKibbin *v.* Peck..... 69
Metropolitan Board of Health, Heister *v.*..... 170
Metropolitan Board of Health *v.* Heister..... 170
Milburn *v.* Belloni..... 343
Morange, Morris *v.*..... 1
Morgan, Sanderson *v.*..... 308
Morris *v.* Morange..... 1
Morris Canal & Banking Co., Townsend *v.*..... 266
Munn, Worrall *v.*..... 100
Murray, Ogden *v.*..... 129

N

Newkirk *v.* N. Y. & Harlem R. R. Co. ..... 196

PAGE

New York Central R. R. Co., Grosvenor *v.*..... 311
New York & Harlem R. R. Co., Edgerton *v.*..... 248
New York & Harlem R. R. Co., Newkirk *v.*..... 196

O

O'Brien, People *v.*..... 90
Ogden *v.* Murray..... 129

P

Park Fire Ins. Co., Leroy *v.*... 316
Peck, McKibbin *v.*..... 69
People, Kennedy *v.*..... 19
People, Lanergan *v.*..... 84
People *v.* O'Brien..... 90
Peteler, Gibert *v.*..... 329
Pettee, Fountain *v.*..... 241
Phillips, Hatters' Bank *v.*..... 302
Porter *v.* Ruckman..... 65
Porter *v.* Spence..... 44

R

Redfield *v.* Tegg..... 320
Remsen, Richtmyer *v.*..... 203
Richtmyer *v.* Remsen..... 203
Roberts *v.* Carter..... 253
Robinson, Bartlett *v.*..... 159
Rosenbach, Hinnemann *v.*..... 257
Ruckman, Porter *v.*..... 65
Ruckman, Sandford *v.*..... 68

S

Sanderson *v.* Morgan..... 308
Sandford *v.* Ruckman..... 68
Scranton *v.* Clark..... 132
Second Ave. R. R. Co., Coleman *v.* ..... 146
Security Fire Ins. Co., Wolf *v.* 286
Spence, Porter *v.*..... 44
Steamboat Josephine, Bird *v.*... 5

T

PAGE
Tegg, Redfield *v*..... 320
Till *v*. Beyer..... 142
Townsend *v*. Morris Canal & Banking Co. ..... 266

V

Van Rensselaer *v*. Barringer.. 150

W

PAGE
Watson *v*. Campbell..... 335
Weber, Brown *v*..... 94
Whiting *v*. Mayor, &c., of New York ..... 192
Winne *v*. Macdonald..... 207
Wolf *v*. Security Fire Ins. Co. 286
Worrall *v*. Munn..... 100

# Transcript Appeals.

MARCH TERM,

1868.

---

## WILLIAM A. MORRIS *v.* H. H. MORANGE.

*Judgment—Foreclosure—Report of Sale—Interlocutory Judgment.*

A judgment is not to be deemed interlocutory where nothing thereafter remains to be judicially determined, but is to be deemed to be final.

The time within which an appeal must be taken, must be reckoned from the date of said judgment.

CLERKE, J.—This action was brought to foreclose the Defendants equity of redemption in mortgaged premises. On the 10th of February, 1863, a judgment was entered at Special Term, directing a sale of the premises for the satisfaction of the debt, with the costs and expenses of the action, and that the Defendant pay any deficiency which might appear after the sale.

In pursuance of the judgment, the premises were duly sold by the Sheriff of Kings county, in which they were situated.

---

*Judgment—Decree—Final.* 43 *N. Y.* 473; 76 *N. Y.* 516; 93 *N. Y.* 218; 134 *N. Y.* 128 (45 *St. Rep.* 584); 15 *Hun,* 430; 30 *Hun,* 263; 48 *Hun,* 208 (15 *N. Y. Supp.* 587; 28 *Week. Dig.* 274); 27 *Misc.* 676, (58 *N. Y. Supp.* 676); 58 *N. Y. Supp.* 825; 10 *Abb. N. S.* 413 (41 *How. Pr.* 358); 15 *St. Rep.* 543 (28 *Week. Dig.* 483); 46 *St. Rep.* 585 (19 *N. Y. Supp.* 785).

*Undertaking on appeal—Conditions—Final Judgment.* 23 *Misc.* 613 (52 *N. Y. Supp.* 210); 84 *N. Y. Supp.* 205; 27 *Misc.* 676 (58 *N. Y. Supp.* 825).

The Sheriff made his report of sale on the 25th of May, 1864, and stated therein that the deficiency amounted to $1,024.47. The report was filed in the office of the Clerk of Kings county, and an order was entered confirming it on the 26th of May, 1864, and the deficiency docketed by the Clerk on the 27th of May, 1864.

Notice in writing of the judgment was served personally on the Defendant on the 16th of February, 1863, and on his attorneys on the next day. A notice of appeal from the judgment was deposited by Defendant in the post-office in New York on the 19th of March, 1863, addressed to the Plaintiff's attorneys at Brooklyn, and another addressed to the Clerk of Kings county, Brooklyn.

The notice of appeal was set aside by an order of the Court, at Special Term, on the ground that it was served too late upon the Clerk; which order was afterwards affirmed by the General Term.

No written notice of the order confirming the report of sale, and stating the deficiency, was given until the 25th of November, 1867, although the Defendant had served the Plaintiff's attorney a notice of appeal from the said order on the 23d day of November, 1867.

The Defendant insists that the judgment entered on the 10th of February, 1863, was only interlocutory, and that the judgment did not become final until the entry of the order confirming the report of sale, on the 27th of May, 1864; and as he had received no written notice of this order until the 23d of November, 1867, his notice of appeal on the 23d was effectual.

The question, then, arising on that motion is, whether the judgment entered on the 10th of February, 1863, was interlocutory or final, or whether it became final only on the entry of the order confirming the report of sale.

As a general rule, undoubtedly, when a judgment or order directs a reference, although it provides for the decision of the main questions at issue, it is deemed interlocutory.

But I think this can only be when there is something reserved for the Court judicially to determine. In the present case the Court determined all that it was necessary to determine judicially by the judgment of the 10th of February, 1863. There was nothing more for it to decide. What was left was to be done by its ministerial officers.

The Sheriff sent in his report, which was filed, and an order was entered, as of course, confirming it. The docket of the deficiency by the Clerk is merely a clerical act in performance of the directions of the judgment entered in the order of February, 1863.

In Mills *v.* Hoag (7 Paige 18), the Chancellor says: "The usual decree in mortgage cases, for the sale of the property and the distribution of the fund among the parties, and finally disposing of the question of costs, is a final decree . . . . and is constantly enrolled as such; although the Master's report of the sale and distribution may be excepted to if it is erroneous; and it may require a subsequent order of the Court to dispose of the questions which may thus arise."

In Johnson *v.* Everett (9 Paige, 636), a decree was made by the Vice-Chancellor of the Seventh Circuit, declaring the rights of the parties, and directing an account in conformity therewith, but reserving the consequential directions and the question of costs until the coming in of the Master's report.

The decree was entered on the 5th of January, 1842, and on the 28th of the same month a copy thereof was served on the solicitor of the Defendant, whose appeal was not entered until some time in the following May. The only question therefore was, whether the decree was final as to the Appellants, or was an interlocutory decree, from which they should have appealed within the fifteen days allowed by the statute for appealing from interlocutory orders and decrees of the Vice-Chancellor. The Chancellor decided that the decree was interlocutory, on the ground that further directions, and the Master's report. "But" (he adds) "if the decree, in addition to the reference to the Master to compute," &c., "proceeds

further, and gives the usual directions in such cases—that, upon the coming in and confirmation of the report of the Master, the premises shall be sold, and that the Master . . . . pay the amount due . . . . out of the proceeds of . sale, and directing the mortgagor to pay the deficiency . . . . the decree is final, although the mortgagor may have the right to except to the Master's report of the amount due."

The case before us is still stronger. The action of the Sheriff was purely ministerial. No exception could have been taken to his proceedings, that they could be reviewed judicially. His duty was merely to enforce the judgment, and to render a report of his action, which was to be filed with the Clerk without any further judicial intervention of the Court.

It may be proper to add that the reasoning by which I have arrived at this result in no respects conflicts with the recent decision of this Court in Clark *v.* Brooks (2 Abb. N. S. 385).

The judgment appealed from in that case was purely interlocutory; there were questions expressly reserved for the further adjudication of the Court—questions upon which the intervention of the judicial action of the Special or General Term was indispensable before a final judgment could be entered.

The order should be affirmed, with costs.

question of costs, were reserved until the coming in of the

Concurring: WOODRUFF, GROVER, MASON, MILLER, and DWIGHT, JJ.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

## IN THE MATTER OF FREEMAN B. BIRD AND FREEMAN B. BIRD, JR., *v.* THE STEAMBOAT JOSEPHINE, HER TACKLE, APPAREL, AND FURNITURE.

*Lien on Vessels—Statute of 1862—Admiralty Jurisdiction—Unconstitutionality.*

A proceeding against a steamer by name, authorized by the statute of 1862, is a proceeding in the nature, and with all the incidents, of a suit in admirality.

The characteristic feature of proceedings under this statute is, that it is a proceeding against the vessel itself, in which it is seized and impleaded as the Defendant, and is adjudged and sentenced accordingly.

ON the 10th day of December, 1866, Freeman B. Bird and Freeman B. Bird, Jr., the attaching creditors in the above-entitled proceeding, filed specifications of lien against the steamboat Josephine, her tackle, &c., pursuant to the provisions of the Act of the Legislature of the State of New York, entitled "An Act to provide for the Collection of Demands against Ships and Vessels," passed April 24th, 1862 (Laws 1862, chap. 482), for supplies furnished by them at the city of New York to the said steamboat, between the 1st day of June, 1866, and the 5th day of December, 1866.

During the said time the steamboat was enrolled at the Custom-House in the city of New York, and was engaged in running between the port of New York and the county of Monmouth, in the State of New Jersey.

The residence of the owner of the steamboat does not appear.

On the 11th day of April, 1867, the attaching creditors duly obtained from Mr. Justice Barnard, a Justice of the Supreme

---

*Lein on vessel—Statute—Constitutionality.* 43 *N. Y.* 55, 556; 44 *N. Y.* 417; 59 *N. Y.* 556; 71 *N. Y.* 418; 86 *N. Y.* 261; 1 *Hun,* 141 (3 *T. & C.* 661); 3 *Hun,* 545 (5 *T. & C.* 618); 18 *Hun,* 58; 3 *Lans.* 420; 33 *Super. Ct.* 345; 37 *Super. Ct.* 120.

*Admiralty—Jurisdiction—State courts.* 56 *N. Y.* 4; 8 *Hun,* 325; 13 *Hun,* 633; 13 *Abb. N. S.* 168; 54 *Barb.* 208.

Court, a warrant of attachment against the said steamboat, to enforce their said lien, and thereupon, on the 12th day of April, 1867, the Sheriff of the city and county of New York seized the said steamboat, her tackel, &c., and made his return of said seizure on the 19th day of April, 1867.

On the 4th day of May, 1867, upon an affidavit setting forth the proceedings of the said attaching creditors, the nature and amount of their claim, and the belief that, by a late decision of the Supreme Court of the United States, it was adjudged that the State Courts had no jurisdiction to enforce a lien based upon claims of the character of the said attaching creditors, and that the power to enforce such lien was vested exclusively in the Courts of Admiralty jurisdiction of the United States, an order to show cause was duly granted by his Honor Justice Barnard, upon motion of the attorney for the owner of said steamboat, directing that the attaching creditors show cause before him, on the 10th day of May, 1867, why the said warrant of attachment therefor, issued by him on the 11th day of April, 1867, should not be set aside and vacated, and staying in the meantime all proceedings on the part of the said attaching creditors.

Thereafter, upon a hearing of the said order to show cause, the said Justice rendered his decision, and made an order, which was duly entered, vacating and discharging the said warrant of attachment, upon the ground that the officer issuing the said warrant had not jurisdiction therefor, the provisions of the said statute conferring such power being in contravention of the Constitution of the United States, and of the Act of Congress vesting jurisdiction in admiralty cases exclusively in the Courts of Admiralty of the United States.

The said order vacating and discharging the said warrant of attachment having been duly entered, the said attaching creditors, on the 17th day of June, 1867, appealed from the said order to the General Term of the Supreme Court.

The said appeal was argued on the 18th day of November, 1867, and thereafter the said General Term rendered a decision reversing the said order of the 7th of June, 1867, and

an order was thereupon duly entered, on the 10th day of February, 1868, in all things reversing the said order of June 7th, 1867; and thereupon the owner and claimant of the said steamboat Josephine, her tackle, &c., duly appealed from the last-mentioned order to this Court.

*Charles A. Rapallo* for Appellant.
*Pinckney & Spink* for Respondents.

MASON, J.—The question presented for adjudication is the constitutionality of the Act of the Legislature of April 24th, 1862, entitled "An Act to provide for the Collection of Demands against Ships and Vessels."

This statute declares that "Whenever a debt, amounting to fifty dollars or upwards, as to a sea-going or ocean-bound vessel, or amounting to fifteen dollars or upwards, as to any other vessel, shall be contracted by the master, owner, charterer, builder, or consignee of any ship or vessel, or the agent of either of them within this State, for either of the following purposes: 1st. On account of work done, or materials or other articles furnished in this State, for or towards the building, repairing, fitting, furnishing, or equipping such ship or vessel; 2d. For such provisions and stores furnished within this State as may be fit and proper for the use of such vessel at the time when the same were furnished . . . . *such debt* shall be a lien upon *such vessel, her tackle, apparel, and furniture, and shall be preferred to all other liens thereon, except mariners' wages.*"

The third, fourth, and fifth subdivisions of the same section, provide in the same manner for a large class of other debts and claims against the vessel, and declare them liens in the same manner, and to the same extent.

The statute provides for a direct proceeding in rem against the vessel, by seizing the same to enforce such liens, and directs how the proceedings shall be conducted; provides for a publication in some newspaper printed in the county, &c.; and, unless the warrant shall be discharged, directs a sale by the sheriff of the county, of the vessel seized, her tackle, &c.

The Sheriff is to return to the officer granting the order his proceedings under the same, and the proceeds, after deducting his fees, &c.; and the statute provides for the distribution of the funds, &c.

The second section of the third article of the Constitution of the United States, among other things, declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."

The ninth section of the Act of Congress, approved September 24th, 1789, commonly called the Judiciary Act, declares that the District Courts of the United States shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it (1 U. S. Statutes at Large, p. 77). It will be seen, therefore, that the judicial power of the United States extends to all causes of admiralty and maritime jurisdiction; and that this Act of Congress declares that the District Courts of the United States shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving only a concurrent common law remedy to suitors, where the common law is competent to give it.

Terms "admiralty and maritime jurisdiction," according to etymology and received use, extend to all things done upon relating to the sea, to transactions relating to commerce and navigation, and to damages and injuries upon the sea—all maritime contracts, *torts,* and injuries (De Lovio *v.* Boit, 2 Gall. R. 468; Dunlap's Admiralty Practice, 41 and 42).

This deligation, then, in the Judiciary Act of 1789, giving to the District Courts of the United States the exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, embraces and comprehends *all maritime contracts, torts,* and *injuries* (De Lovio *v.* Boit, 2 Gall, R. 474; Dunlap's Admiralty Pr. 43).

The civilians and jurists agree that charter-parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, *supplying,* and navigating ships,

are, among other things, embraced in the term "maritime contracts" (Dunlap's Admiralty Pr. 43; 2 Gall. R. 474).

The general terms of the grant of judicial power in the Constitution of the United States to the Federal Courts, in all causes of admiralty and maritime jurisdiction, have rendered it difficult to define the exact limits of this power in the Federal Courts.

This difficulty has arisen from the following considerations: At the time of the adoption of the Constitution of the United States, Courts of admiralty and maritime jurisdiction had been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them.

The maritime Courts of the continent of Europe formerly "included jurisdiction of all controversies respecting freight; of damages to goods shipped; of the wages of mariners; of the partition of ships by public sale; of jettison; of commissions or bailments to masters and mariners; of debts contracted by the master for the use and necessities of his ship; of agreements made by the master with merchants, or by merchants with the master; of goods found on the high seas, or on the shore; of the armament or equipment of ships, galleys, or other vessels, and generally of all other contracts declared in the customs of the sea" (2 Gall. R. 400; Dunlap's Adm. Pr. 1).

This jurisdiction, at the time of the adoption of our Federal Constitution, differed very essentially in the different States, and in England, to which we have been accustomed to look for the boundaries and jurisdiction of the Common Law Courts. The Courts of Admiralty in England, after a struggle, and severe contest with the Common Law Courts for nearly two centuries, had, at the time above referred to (the adoption of our Federal Constitution), been greatly shorn of their ancient jurisdiction.

The frequent prohibitions upon their jurisdiction by the Common Law Courts, maintained as they were by a zeal and pertinacity seldom equalled, resulting in collisions so severe

that the Admiralty, being compelled to yield under the Common Law to prohibitions issued against them on several occasions, sought redress in petitions to the King, which resulted in agreements, or stipulations, as to their jurisdiction; and then, again, on complaint from the Admiralty that these stipulations were violated, in the granting of new prohibitions; and then came new stipulations.

The results of these controversies were essentially to drive the Admiralty Courts in their jurisdiction entirely from the land to the sea, while the Common Law Courts asserted and maintained complete concurrent jurisdiction of all causes cognizable in Admiralty, except prize cases.

The limited powers now exercised by the Courts of Admiralty in England have not been maintained without the most severe struggles, and are held by our Federal Courts not to be controlling as to the jurisdiction of our Admiralty Courts in this country.

If we turn from the Admiralty Courts in England to the American colonies, it will be seen that the Admiralty Courts in the colonies, before the American Revolution, possessed very extensive admiralty jurisdiction—more so than the Courts of Admiralty in England; and yet their powers were not uniform in the colonies.

They were generally conferred by commissions from the King.

The commission issued to the Governor of New Hampshire was most extensive.

And the Vice-Admiralty Court in Massachusetts had jurisdiction far more extensive than that of the Admiralty Courts in England (2 Gall. R. 471, 480).

It was in this state of confusion as to the admiralty jurisdiction that the Constitution of the United States was adopted, conferring, in these general terms, judicial power upon the Federal Courts in all causes of admiralty and maritime jurisdiction.

There have been other difficulties which our Courts have had to encounter in defining with precision the boundaries of

the jurisdiction of the Admiralty Courts of this country, arising from the complex character of our government, where separate and distinct specified powers of sovereignty are exercised by the United States and a State, independently of each other, within the same territorial limits.

The complex character of the government has led the United States Courts, in some cases, into a novel and very ununiform system of admiralty administration, by allowing and sustaining proceedings in rem wherever the local law or statutes of a State gave a lien upon the property, instead of looking to the maritime law for its guide (The Gen. Smith, 4 Wheat. R. 438; 1 Sumner's R. 74, 79; 1 Story's Circuit C. R. 68; id. 246; The Steamer St. Lawrence *v.* Meyer et al., 1 Black's Rep. 523).

This practice was made a rule of Court in 1844, which was abolished by rule in 1858, and since that time the Courts have refused to enforce such liens in rem where they rested solely on State statutes.

The question presented in this case involves a conflict between the State and Federal Governments. The Federal Government has no power or jurisdiction except that conferred by the Constitution itself. The extent of the power withdrawn from the States and vested in the General Government, as we have seen, extends to all "cases of admiralty and maritime jurisdiction," and the extent of the power depends upon a proper construction of this constitutional provision.

Its terms are certainly indefinite, arising from the considerations to which we have above referred.

Its limits can only be ascertained by reference to what cases were understood in this country, and by the framers of the Constitution, to be cognizable in the maritime Courts, when the Constitution was formed; for what was meant by it then, as the framers then understood it, is the true criterion by which it is to be construed.

Many of the framers of the Constitution participated in the passage of the Judiciary Act of 1789, which conferred upon the District Courts of the United States exclusive cognizance

of all civil causes in admiralty and maritime jurisdiction, saving to the Common Law Courts of the States, in all cases, the right to administer common law remedies, where the common law was competent to give it.

The construction put upon this constitutional provision, therefore, by the framers of the Judiciary Act of 1789, is that the maritime jurisdiction conferred upon the Federal Courts in all admiralty and maritime causes is exclusive, and that there is no reserved concurrent jurisdiction saved to the States; and such is now the settled construction put upon this provision of the Constitution by the Supreme Court of the United States.

The proceedings in rem under the State statute of 1862, in the case under consideration, cannot be sustained, as the statute itself is unconstitutional, if this is to be regarded as a maritime contract, of which a Court of Admiralty has jurisdiction.

This question has been expressly decided by two recent decisions of the Supreme Court of the United States.

In the case of The Moses Taylor (4 Wallace, U. S. R. 411) a statute similar to our own was held to be in conflict with the Constitution of the United States; that the ninth section of the Judiciary Act of 1789, which vests in the District Courts of the United States exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, is constitutional.

It was expressly held, in that case, that a statute of California, similar to our own, which authorizes proceedings in rem against vessels for causes of action cognizable in admiralty, to that extent attempts to invest the Courts of that State with admiralty jurisdiction; that the clause in the ninth section saving to suitors the right of a common law remedy, where a common law remedy is competent to give it, does not save a proceeding in rem, as used in the Admiralty Courts.

These principles were all reaffirmed in the case of The Hine *v.* Trevor (4 Wallace R. 556), in which the State statutes of Iowa, which are very much like ours, authorizing the attach-

ment of vessels, were held invalid, as being in conflict with the Act of Congress conferring exclusive admiralty and maritime jurisdiction upon the District Courts of the United States.

The latter was a case of maritime tort for a collision on the Mississippi River, at or near St. Louis, and the vessel was seized while lying at the landing at Davenport, in the State of Iowa.

The claim in the case under consideration was for supplies furnished to the steamer Josephine—a domestic vessel, and in her home port; but the supplies were furnished to her while she was running from the port out of the bay of New York and around to Monmouth county, in the State of New Jersey.

Now, assuming that New York City was the home port of this vessel, there was no lien under the maritime law which could be enforced in rem in a Court of Admiralty (The Gen. Smith, 4 Wheat. R. 438; Maguire, Claimant, *v.* Stephen Card, 21 How. R. 248; The Levi Dearborne, 4 Hall's Law Journal, 97; 2 Gall. R. 483; The Two Friends, Bee's Adm. R. 433; The Robert Fulton, 1 Paine's R. 627; The President, 4 Wash. C. C. R. 453; Peyroux *v.* Howard, 7 Peters, 341; Dunlap's Adm. Practice, 54); and where a State statute gives such a lien, as we have seen, our Courts of Admiralty will not enforce it (Thomas Maguire *v.* Stephen Card, 21 How. R. 248; The Steamer St. Lawrence, 1 Black, 522).

If this vessel was owned in New Jersey, as is suggested by the Appellant's counsel in his brief, then the maritime law gives a lien for these supplies, and proceedings in rem in admiralty may be taken to enforce it (The Gen Smith, 4 Wheat. R. 438; The Jerusalem, 2 Gall. R. 349; The Sandwich, 1 Peters' Adm. R. 233, note; The Eagle, Bee's Adm. R. 78; The Aurora, 1 Wheat, R. 105; Dunlap's Adm. Pr. 54).

This case, as I understand it, admits this to be a New York vessel, and that these supplies were furnished to her in her home port, and consequently there was no lien upon the ves-

sel, and no proceedings in rem could be taken in the Admiralty Courts.

It remains to be considered whether our Courts of Admiralty had jurisdiction in a suit in personam to enforce payment of this claim for supplies. There can be little doubt on this subject; and I will content myself by simply referring to the following authorities, in our own Courts, which fully sustain it: The Gen. Smith, 4 Wheat. R. 438; 12 Wheat R. 611; 7 id. 395; 10 id. 473; 6 How. U. S. R. 344; 3 Mason's R. 94; 1 Sumner's R. 157; 4 Mason's R. 196. The admiralty jurisdiction in a suit in personam does not depend upon the question of lien (Marshall *v.* Bazin, 7 N. Y. Leg. Obs. 342; 1 Abbot's Adm. 1; Blatchford's R. 175).

The right of admiralty to proceed in rem is cummulative in many cases, and does not exclude the remedy in personam (Brevoor *v.* The Fair American, 1 Peters' Adm. R. 487).

As it is settled by the decisions of the Supreme Court of the United States in the cases referred to above (The Moses Taylor, 4 Wallace R. 411; The Hine *v.* Trevor, id. 555, 568), that exclusive cognizance conferred upon the District Courts of the United States excludes all jurisdiction from the State Courts, except such concurrent remedy as is given by the common law, it follows that these proceedings in rem, under the statute of this State, cannot be sustained.

This proceeding against this steamer by name, authorized by the statute of 1862, is a proceeding in the nature, and with all the incidents, of a suit in admiralty. The characteristic feature of the proceedings under this statute is, that the vessel proceeded against is itself seized and impleaded as the Defendant, and is adjudged and sentenced accordingly, which is just the proceeding in a Court of Admiralty in proceedings in rem.

These views lead to the reversal of the order appealed from, and the affirmance of the order of the Special Term, or of the Judge in Chambers.

Concurring: HUNT, Ch.J., and WOODRUFF, DWIGHT, and BACON, JJ.

GROVER, J. (dissenting).—The question in this case is whether, under the provisions of chapter 482, of Laws of 1862, a valid lien can be acquired upon a vessel, her tackle, &c., by furnishing provisions and stores to such vessel at her home port, within this State, while such vessel is engaged, from time to time, in making voyages from such port to Monmouth, in the State of New Jersey, and whether such lien can be enforced pursuant to the provisions of said act, or whether the said act, so far as it provides for the acquisition and enforcement of a lien in such case, is invalid. It would seem to be clear that the act is valid for the creation of a lien. It must be so for its enforcement, because, were it not so, there would be no mode of enforcing it, and the lien, for want thereof, would of necessity be a nullity.

The act is claimed to be invalid upon the ground that it conflicts with the exclusive admiralty and maritime jurisdiction vested in the Courts of the United States. If such lien and its enforcement does so conflict, it follows that the Act is void; for when the Constitution of the United States, and the laws made in pursuance thereof, vest exclusive jurisdiction in the United States Courts,no State Court, or officer acting under that authority, can in any manner interfere therewith.

The inquiry, therefore, is, whether creating and enforcing a lien for the collection of this debt, in this case, does conflict with the exclusive jurisdiction of the United States Courts in admiralty and maritime causes.

Section 2, art. 3, of the Constitution of the United States extends the judicial power of the Government to all cases of admiralty and maritime jurisdiction. Section 9 of the United States Judiciary Act of 1789 enacts that the District Courts of the United States shall have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it.

The jurisdiction of the District Courts in admiralty and maritime cases is made exclusive. The lien sought to be en-

forced in the present case is not a common law remedy. It therefore follows that if enforcing the lien in the manner provided by the act, in the present case, be a proceeding in admirall such as are dependent upon or originate from that law. In respect to all such liens the jurisdiction of the United States District Courts is exclusive, and State Courts and officers cannot interfere therewith, although liens for the same cause may have been declared by State statutes, and authority to enforce the same may have been thereby attempted to be conferred upon the State Courts.

This was the point adjudged in Hine *v.* Trevor (4 Wallace, 555), and the only point determined which has any bearing upon the present case.

In the Moses Taylor (4 Wallace, 411) the contract was to be performed upon the high seas. It was therefore a maritime contract, and within the jurisdiction of admiralty to redress the injuries sustained by a breach. It was therefore held that the admiralty jurisdiction was exclusive, excepting only the common law jurisdiction reserved to the States by the Act of Congress (supra).

These are the cases relied upon by the Appellant to show that the act of 1862 is invalid, in respect to the proceedings in the present case. An examination will show that the present case does not fall within the same principle.

In the present case the demand is for supplies furnished to the ship while lying at the dock at her home port (New York). No lien upon the vessel for such a demand is given by the maritime law of England or this country (2 Ld. Raymond, 806; The General Smith, 4 Wheat. 438; Barque Chusan, 2 Story, 462; 1 Kent's Com. 380, and cases there cited).

These cases show that, for such a demand, the only remedy is against the owner of the vessel, upon whose credit the goods are presumed to have been delivered.

It is then simply a case of the collection of a debt by a creditor. Over this class of cases the State authorities have plenary power.

It is for the States respectively to provide and regulate the remedies in their discretion. They may require that the creditor shall proceed according to the course of the common law, or in such other mode as it shall provide or may deem expedient.

They may provide, as in the act of 1862 in question, that the debt may be made a lien upon any of the property of the Defendant, and may provide for the enforcement of such lien as they shall deem proper, as in the case of material-men and mechanics' liens, and in other cases.

There is nothing peculiar to property in ships, when in the jurisdiction of a State, exempting it from the same liability in this respect as other property is subject to. Ships may be levied upon by execution issued by State Courts against the owners, or seized upon attachments issued in like manner.

The act of 1862 provides for creating a lien upon the vessel for the debt in the present case, and for its enforcement for its satisfaction. This is no exercise of admiralty jurisdiction. The lien is created wholly by the local law. The maritime law, we have seen, gives none.

It is the mere remedy provided by the State for the collection of a debt by the creditor out of the property of the debtor, and no more interferes with the exclusive jurisdiction of the District Courts than it would had the statute provided for a lien upon any of the other property of the debtor.

Under the rules adopted by the Supreme Court of the United States in 1844, for the government of the District Courts in admiralty cases, those Courts entertain jurisdiction in rem, founded upon the lien given by the State law, in cases like the present; and such jurisdiction was sustained by the former Court (Peyroux *v.* Howard, 7 Pet. 341; The Case of Steamer St. Lawrence, 1 Black, 522). The exercise of this jurisdiction continued until 1858, when the rule was changed by the Court, by providing that, in cases like the present, process should only issue in personam—thus relieving the District Courts from their duty to enforce liens created by State

laws; leaving such liens to be dealt with by the State authorities.

The lien does not depend for its validity upon the rules of the Supreme Court of the United States, but upon the constitutional powers of the States to pass the acts providing for it.

We have seen that liens under State laws were held valid by that Court, prior to the change in its rule in 1858; and they have not been adjudged invalid by it in any case like the present since.

But it is said that inasmuch as the Admiralty Courts issue process in personam against the debtor for the collection of debts, like the one in the present case, and thus entertain jurisdiction, such jurisdiction is exclusive, by the Act of Congress, of all other, except common law remedies, for the collection thereof. But I think the act of Congress was only designed to embrace cases where the admiralty proceeded, according to the more usual course of that Court, in rem, and not to cases where it proceeded in personam.

There is a reason for excluding jurisdiction in the former which does not exist in the latter; viz. to avoid conflicting claims to property arising under conflicting jurisdictions.

That this was the object appears from the saving of the common law remedies in the State Courts, in cases where the admiralty proceeds in rem. Taking away from the States the exercise of other powers could confer no advantage upon any one. The proceedings under the act of 1862, in the present case, are similar to proceedings had under similar State statutes for a great number of years, during which their validtiy has not been questioned. Important rights have been acquired thereby.

This is not conclusive, but is entitled to consideration in determining their validity. My conclusion is that they are valid in all cases where the admiralty cannot proceed in rem, by virtue of the maritime law. This leads to an affirmance of the order appealed from.

Reversed.

JOEL TIFFANY,
State Reporter.

# JOHN KENNEDY, PLAINTIFF IN ERROR, v. THE PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

*Indictment—Murder—Degrees—Name of Criminal.*

An indictment for murder in the common law form, charging the killing with malice aforethought, is good, notwithstanding our statute has divided the crime of murder into different degrees; and a conviction as charged is a conviction of murder in the first degree.

The statute is not a rule of pleading, but a guide to the conduct of the trial, prescribing the proofs requisite to a conviction.

Charging the killing of T. H., alias T. J., is not defective for uncertainty, nor duplicity. That expression does not import a killing of "either T. H. or T. J.," but a killing of T. H., otherwise called or known as T. J. The omisison of the other Latin word "dictus" is not material.

On a trial for murder it is competent to prove that the deceased had money in his possession shortly before his death. How far back the inquiry should extend will depend upon the circumstances, which may render it more or less probable that the deceased retained it in his possession.

But declarations of the deceased, some weeks before his death, that he had no money, are not admissible as proof of that fact.

The form, nature, extent, depth, length, width, and direction of the fatal wounds, with their precise location on the head, the amount of force requisite to produce them, and the probable shape of the instrument, being proved, it is not competent to receive the opinion of the surgeon as to the probable position of the deceased when the blows were received. Surgeons are not presumed to be experts in the matter of giving or receiving such blows, and the jury are equally capable of drawing the proper inferences from the facts proved, if material.

But where it was conceded throughout the trial that a wilful and deliberate murder had been committed, the admission of such an opinion furnishes no ground for the reversal of the judgment, it having no possible bearing on the question whether the prisoner was the perpetrator—the only question in fact contested.

AT a Court of Oyer and Terminer for the county of St.

---

*Indictment—Sufficiency—Common law—Form.* 97 *N. Y.* 68; 156 *N. Y.* 307; *D.* 173 *N. Y.* 141; 17 *Hun,* 416; 21 *Hun,* 428 (8 *Abb. N. C.* 35); 33 *St. Rep.* 423 (11 *N. Y. Supp.* 423); 22 *N. Y. Supp.* 691

*Evidence—Competency.* 44 *N. Y.* 191, 348.

*Evidence—Opinion by experts.* 55 *N. Y.* 180; 109 *N. Y.* 354 (15 *St. Rep.* 503); 64 *N. Y. Supp.* 245.

*Opinion by lay person.* 172 *N. Y.* 230.

Lawrence, the Plaintiff in Error was indicted, tried, found guilty, and sentenced to be hung for murder. The indictment charged that on the 10th of February, 1867, John Kennedy (the Plaintiff in Error), at the town of Dekalb in the said county, &c., "in and upon one Thomas Hand, alias Thomas Jackson, in the peace of the people," &c., "willfully and feloniously, deliberately and premeditately did make an assault," and "with a certain axe which he, the said John Kennedy, in his hands then and there had and held, him, the said Thomas Hand, alias Thomas Jackson, in and upon the head of him, the said Thomas Hand, alias Thomas Jackson, then and there willfully, deliberately, premeditately, feloniously, and of his malice aforethought, did beat, strike, stab, cut, and wound, giving unto the said Thomas Hand, alias Thomas Jackson, then and there, with the axe aforesaid, in and upon the head . .one mortal wound of the breadth, &c., . . of which said mortal wound he, the said Thomas Hand, alias Thomas Jackson, on," &c., at, &c., "did die; and so the jurors aforesaid do say that he, the said John Kennedy, him, the said Thomas Hand, alias Thomas Jackson, in manner and form and by means aforesaid," at, &c., "on the day and year aforesaid, willfully, deliberately, premeditately, feloniously, and of his malice aforethought, did kill and murder, against the form of the statute," &c., " and against the peace," &c.

When the case was brought on for trial the counsel for the prisoner moved to quash the indictment, on various grounds, which were overruled, and exception was taken. Two only of the objections then taken are insisted upon in this Court—First, that the indictment is bad for duplicity, "for the reason that it charges the prisoner with the murder of Thomas Hand, alias Thomas Jackson;" and second, that if it was intended to charge that Thomas Hand was also known by the name of Thomas Jackson, then the words in the indictment should have been "Thomas Hand, *alias dictus* Thomas Jackson."

On the trial the first witness examined was Dr. John R. Furness, a physician and surgeon, and Coroner of the county. He was called to examine the body of the deceased: found the body in the cellar of the house in which the deceased lived

alone. He described the wounds upon the head, the room in which was the stove, the furniture, and the bed of the deceased, the bloody axe found near the stove, the blood on the floor, and the trap-door at the foot of the bed under which lay the body. He gave, with great particularity, the form, extent, and depth of two wounds—one on the left-hand side of the back part of the head, and the other on the top of the head; gave his opinion as to the shape of the instrument by which the wounds were made, and the direction of the blows, and their effect, thus: "The shape of the instrument that created the wounds I cannot say further than it was a blunt instrument; each of those wounds cut arteries. The wound on the back part of the head must have cut a superficial artery —a branch of the occipital artery; and the wound on the top of the head must have injured arteries—not cut them, but torn them. Blood would flow instantly on receipt of the blow inflicting those injuries. The instrument that inflicted the blow back of the ear must have been longer than it was wide, and blunt. It injured the back part of the head, on the left side back of the ear, and the bone back of the ear. The skin was raised slightly, as if peeled a little from the bone, leaving a gash or open wound of about half an inch wide, and the depth was as far as to the bone. Striking the scalp from above and backward would make such a gash—in a vertical or slanting direction: a blow with a blunt instrument."

The counsel for the people thereupon inquired: "In what position do you judge the body to have been when it received the blow upon the side of the head?"

The question was objected to as incompetent, and as calling for the opinion of the witness, instead of facts. The objection was overruled, and an exception taken on behalf of the prisoner.

The witness answered: "I should judge that he was in a stooping position. It is only a matter of opinion, but I should think probably that he was sitting in a chair, or on the side of the bed, and stooped with his head upon his hands or in some such position."

Question: "In what position would you think he was when the wound on the top of the head was given?"

This question was in like manner objected to, but was allowed, and exception was taken.

Answer: "Probably lying down, either on his back or face. He might have been lying in either position."

Question: "State the amount of force, as near as you can, required to break the scalp or skull?"

To this the prisoner's counsel interposed the like objection, and excepted to its allowance.

Answer: "Any man with a heavy instrument, like an axe or club, could inflict such a wound; almost any man would be strong enough to do it. A man is capable of exerting a good deal of force with an axe. From the shape of the bones it would require a good deal of force to do it."

Various testimony was given for the purpose of charging the prisoner with the crime, and, among other facts, it was shown that, during a portion of the winter, he had worked for and lived with the deceased; and some of the evidence indicated that the prisoner, more than any other person, had his confidence. One of the witnesses (Robert Creighton) having testified that the prisoner "lived with Thomas Hand about three weeks; there was no other person living there at the time; I do not know whether Hand had any money," was asked—

"What produce did he have that he sold last fall?"

And to this question the prisoner's counsel objected as immaterial, and on its admission excepted.

Answer: "Eight or nine tons of hay I know of, and ten bushels of peas; I cannot tell how much he received for them; I know of his selling wood; there was three cords of dry wood for three dollars a cord, and some little green wood—two or three loads probably."

And again, on the examination of a nephew of the deceased, the counsel for the people proposed to inquire whether such nephew, who arrived in this country the previous summer, brought from England and paid to the deceased, in gold, twenty-one sovereigns, and to this the counsel for the prisoner

objected, on the ground that it related to a matter too remote in point of time; and excepted to its allowance.

The witness answered: "I gave to Thomas Hand a quantity of gold; it was some time from the 6th to the 10th of July; it was in sovereigns; there were twenty-two; I do not know what he kept it in; I delivered it, and he put it in his pocket-book or purse; I do not know what he did with it after that."

In the cross-examination of one of the witnesses for the prosecution (Patrick Kennedy) he testified, that while the prisoner was at work at the deceased's house (about two weeks after Christmas) he heard a conversation between them about work. The prisoner's counsel inquired "What was it?" and on objection, stated that he offered to prove that Hand declared he had no money. The testimony was excluded, and exception was noted.

Although other objections and exceptions were made and taken during the trial, the foregoing statement embraces all the rulings that are insisted upon as erroneous by the counsel for the Plaintiff in Error in this Court. On the submission of the case to the jury they returned a verdict finding the prisoner "Guilty of the offence whereof he stands charged in the indictment;" and thereupon the prisoner's counsel moved an arrest of judgment, on the ground that the indictment was in the common law form of indictment for murder, and not an indictment charging murder in the first degree under our statute; that the indictment was equally applicable to murder in the first and in the second degree, and a verdict of "guilty as charged," was not definite and certain as to the degree of murder of which he was found guilty; that the Court could not determine, from the verdict, of what degree of murder the jury found the prisoner guilty, and therefore, for want of certainty, the Court could not sentence the prisoner.

The Court held otherwise, and proceeded to sentence the prisoner to death—the punishment of murder in the first degree—and exception was taken on behalf of the prisoner.

On writ of error, the judgment of the Oyer and Terminer was affirmed by the Supreme Court, in General Term, in the

Fourth District, whereupon the prisoner, by writ of error, brought the record and proceedings into this Court.

*Charles G. Myers* for the Plaintiff in Error.

*B. H. Vary* for the People.

WOODRUFF, J.—1. In Fitzgerrold *v.* The People, this Court, at the January Term last past, decided that an indictment charging the prisoner in terms nearly identical with those employed in the present case, is a good and sufficient charge of murder in the first degree. That the statute defining murder in the first degree, murder in the second degree, and manslaughter, has not changed the form of pleading so that an indictment for *murder,* good at the common law, is no longer sufficient. That under such an indictment there may be a conviction of murder in the first degree, or in the second degree, or of manslaughter, according to the description of the act given and proved; and that the statute is not a rule of pleading, but a guide to the conduct of the trial, and to the instructions to be given to the jury; and therefore that a general verdict of guilty as charged, is a conviction of murder in the first degree, and warrants a sentence of death—its legal penalty (Conkey et al. *v.* The People, 5 Parker's Cr. R. 31; Wharton's Cr. Law, § 3048; Harmon *v.* Commonwealth, 12 Seg't & R. 69).

2. It was objected on the trial, in the present case, that the indictment is bad, because it charges the prisoner with the killing of Thomas Hand, alias Thomas Jackson. There is nothing in the suggestion that this created any duplicity; the charge, in no sence of the word "alias," imported the killing of two persons. To give it such an effect would be to construe it as meaning Thomas Hand and Thomas Jackson, which neither its proper Latin signification, nor its English use, would allow. A more plausible suggestion would have been, that it was bad for uncertainty, because it left it doubtful whether the killing of Thomas Hand, or the killing of Thomas Jackson, was charged. But in order to create this doubt it is necessary to read the word as meaning "or," after the word "either," and so make the indictment charge the

killing of one of two persons—that is to say, with the killing of either Thomas Hand or Thomas Jackson. But this again is not according to its well understood meaning, as a term in the law long used to avoid a variance or misnomer in pleading. It does not indicate that different persons are intended, but in pleading—both in civil and criminal actions—that the names mentioned are different descriptions of the same person. Counsel for the Plaintiff in Error is right in claiming that it was formerly employed in pleading in connection with "dictus," and in that connection the charge would import the killing of Thomas Hand, otherwise called Thomas Jackson. And the argument is in substance a concession, that had the pleader used the full expression, "alias dictus," or "otherwise called," the supposed defect would not exist. I apprehend that the use of the single word "alias" to express the whole meaning has so long obtained that it is not uncertain what is the true meaning of the charge, and if not, then there is no just ground for the exception.

Unless there is such uncertainty the objection, even if technically sound, is not of substance, but of mere form, and could in nowise prejudice the prisoner, and therefore neither renders the indictment invalid, nor affects the proceedings (2 Rev. Stat. 728, § 52). The term has become familiar as equivalent to "otherwise called," or "otherwise known as," and may be properly so treated, as having by use in pleadings, in English, acquired that import, as a technical term constantly employed in that sense, without its former Latin companion.

On the argument of the case in this Court the counsel for the Plaintiff in Error has enlarged the objection taken below, and now, after verdict, insists that even if "alias" may be held to import the full meaning, "otherwise called," still the conviction should be reversed, because the alias should follow the true name, and that the indictment here should have charged the killing of Thomas Jackson, alias Thomas Hand, and not the killing of Thomas Hand, alias Thomas Jackson. No such point appears to have been taken below, and no point so purely technical, so void of intrinsic merit, should be permitted to be first raised here, when no possible prejudice could happen to

the prisoner by reason of the error, if it were an error. It is by no means clear that if the fact assumed were true, the objection would have any force. Where one had executed an instrument by a wrong surname, it was long since held that he might be sued by such wrong name, "alias dictus" his true name (3 Salk. 238); and it was in the days of very rigid adherence to technicality when it was so held. In respect to Christian names the rule was otherwise, both in civil and criminal proceedings (3 Salk. 238; 1 Ld. Ray'd, 562). On the other hand, Reid *v.* Lord (4 Johns. 118) is to the effect that the true name is that which precedes the "alias dictus," and does not notice the distinction above stated. But there is another sufficient answer to the objection. It is not found that the true name of the deceased was not Thomas Hand. On the contrary, the verdict finds the prisoner guilty as charged, and if the pleading on its face imports—as the prisoner's counsel now claims it does—that Thomas Hand was the true name of the deceased, and Thomas Jackson a name by reputation only, then the jury have found the prisoner guilty of the murder of Thomas Hand, who by reputation had the name of Thomas Jackson.

If we are called upon to look at the evidence, and say whether such a verdict should be sustained, we cannot say that it should be set aside as against evidence, or that the testimony shows conclusively that Thomas Hand was a ficticious name. During his residence in this country he was known, and only known, as Thomas Hand. He appears to have been in this country twenty-two years. His nephew, who came to this country the summer previous to the murder, testified: "I am a nephew of Thomas Hand, deceased; I was *not much acquainted* with him in England; I recollect him, that was all; his name there was was Thomas Jackson." No other evidence was given to show that the deceased bore the name of Thomas Jackson. The name of his father or mother, brother or sister, or other relative (save the nephew's name), was not proved. All lies in the recollection of one who was not much acquainted with him, whose memory is taxed to go back twenty-two years, and who barely remem-

bers him. On this evidence we cannot say whether the name by which he was thus faintly recollected may not have been assumed. Doubtless the name by which he was known (if the nephew's recollection is correct) in the land of his birth, would seem most likely to be the true name; but we could not disturb a verdict upon such a ground and upon such evidence. Besides, the question does not arise as it did in the cases above cited. Those were cases in which the Defendant was himself declared against, or indicted, with an alias. Even there, appearance and plea to the merits waived the error, if any, and after verdict the objection would not avail. Here, if the true name of the deceased were Thomas Jackson, and the name by reputation Thomas Hand, a description of the deceased as Thomas Hand, alias Thomas Jackson, would not be such a misdescription as to be fatal after verdict.

If, therefore, no error was comitted in receiving or rejecting testimony, there is no ground for reversing the judgment.

3. It was not erroneous to reject testimony to the declaration of the deceased, that he had no money.

The question whether the deceased had or had not money in his possession at the time of his death was, no doubt, a material one, as will presently be considered; and it may have been material to show that the prisoner was aware that the deceased had money; but the declaration of the deceased, some weeks before the murder, was not competent evidence that he had no money; it was no more evidence as against the people, or for the prisoner, than his declaration upon any other subject would have been.

I know of no rule which makes the declarations of the deceased, forming no part of the res gestæ, competent evidence, either for or against either party. It has no analogy to dying declarations, which are received, when made in view of approaching death, as having a sanction equivalent to testimony given under the solemnity of an oath before the Court and jury.

4. Nor was it erroneous to allow proof of sales of produce made by the deceased in the previous fall, or that his nephew had paid to him sovereigns in the previous July.

Proof tending to show that the deceased had money suggests a motive for committing a robbery, and so a motive to take the life of the deceased, if that would facilitate the theft, or contribute to its concealment. Such a fact formed a prominent circumstance, tending to the conviction of the prisoner, in Gordon *v.* The People (33 N. Y. 501), and was not suggested as of doubtful admissibility in that case. And this Court, in Hendrickson *v.* The People (10 N. Y. 13), went much further in sustaining the admission of evidence tending, as was claimed, to show a motive for the commission of the crime charged, by receiving testimony which, at most, only showed that the prisoner had a diminished interest in the continuance of his wife's life. It is always a just argument on behalf of one accused, that there is no apparent motive to the perpetration of the crime. Men do not act wholly without motive. On the other hand, proof of motive tends, in some degree, to render the act so far probable as to weaken presumptions of innocence and corroborate evidence of guilt.

Whether the time of the possession of money by the deceased be or be not too remote to render the evidence proper, must depend very much upon the circumstances of each case. The prosecutor here had given some evidence that, about six weeks before the murder, the deceased had gold, which he desired to sell. The evidence on this point, which was objected to, was that, in the previous July, his nephew had paid him gold. This testimony rendered it probable that it was the gold then received which he had retained and proposed to sell. It did not appear that he in fact sold it, but if he had, it would have left some presumption that he had in his possession the proceeds; and proof of his sales of produce had a similar tendency. All this evidence was slight in its bearing on the guilt of the prisoner, but in its nature it was competent, and it was for the jury to consider and determine its weight. Had the deceased been engaged in traffic—buying, selling, and dealing with others frequently—it might not be proper to go back six months for proof that he received money, unless it was followed by other evidence showing its retention. But here the deceased led a solitary life—mingled very little with his fellowmen. If the testimony did not amount to proof of

a miserly habit, it certainly indicated a habit of living so free from expense that the jury might well infer that any considerable amount of money in his possession during the fall, or held by him six weeks before his death, was for the most part in his possession when he was killed.

In connection with the other testimony—that the prisoner proposed, at about the time of the murder, to purchase land in the neighborhood—such proof was in its nature competent, and might properly be submitted to the jury as evidence, though slight, that the prisioner, having the opportunity, had also a motive to the crime. It must be conceded that such evidence should be weighed with extreme caution. It is entirely consistent with the perfect innocence of the accused. Of itself it could by no means warrant a conviction. The prisoner, it appeared, alleged that he had money in Canada with which to make the purchase he talked of; and that may be entirely true. The temptation furnished by the proof in this case would seem wholly inadequate to the commission of the crime. But that, to the upright mind, is true of any pecuniary or other motive of mere gain that can be suggested. Unfortunately, in the history of mankind such motives to crime are sometimes influential, and proof of their existence must be left to the jury to be weighed, whether apparently greater or less, in connection with the other circumstances disclosed by the testimony, and in view of the condition, circumstances, habits, and character of the party on whom such motives are alleged to operate.

5. The admission of the testimony of the Coroner, who was a physician, as to his opinion respecting the postion of the deceased when the blows were given which caused the fatal wounds, is far more questionable. He had described the wounds; he had given their position upon the head, their direction, their length, width, and depth. He had been permitted to give, as far as he was able, the shape of the instrument with which the blows were inflicted, and to state that "striking the scalp from above and backward would make such a gash—in a vertical or slanting direction: a blow with a blunt instrument." If any other *fact* was wanting which could guide the judgment in determining the manner of the killing, and which medical or surgical skill could supply, it was competent to inquire further

of the witness. Indeed, one of the questions which became the subject of exception here insisted upon, was, I think, clearly competent in that view—viz. as to the amount of force requisite to break the skull. He had not only the skill and knowledge resulting from his professional familiarity with anatomy, and the structure, thickness, and strength of the human skull generally, but he had the particular knowledge acquired by the ex-broken, seems to me quite clear. But here I think, was an end, of the inquiries permissible to draw from him mere opinions. Having stated all this, he was no more competent to give an opinion as to the position of the body when struck than any other person. One blow was received by the deceased on the left side of the back of the head. How is it possible that a surgeon can tell better than one who who is not a surgeon, how the head must be placed so that such a blow can be given? It is entirely obvious that it must be in such a position that it is accessible. In one position it would be easy to reach it; in another it would be difficult; and in yet another it might be impossible. I am not aware that surgeons are experts in the manner of giving blows of this description, or in determining how the head must be placed so as most conveniently to receive them. The form, nature, extent, depth, length, width, and direction of the wound being given, and its precise location on the head, with a general statement of the amount of force requisite to cause it, and the probable shape of the instrument, the jury can judge as well as any one in what position the head or the body probably was when the blow was given. At best, it seems to me, there can be nothing more than a conjecture among several suppositions; but surgical skill has little to do with the inquiry.

Still less was the position of the body, when the blow was given which caused the wound on the top of the head, the proper subject for an opinion by the surgeon. Obviously a blow may be given on the top of the head whenever the top of the head is within reach of such a blow from the assailant; it may be when sitting; it may be when lying down. A short man standing might receive such a blow from one who is very tall. When all the facts are stated, it must necessarily be nothing but conjecture. And the answer of the witness in this case shows that he could only venture to state that the deceased was

*probably* lying down. He was no more competent to infer such probability than the jury were. It is only when the matter inquired of lies within the range of the peculiar skill and experience of the witness, and is one of which the ordinary knowledge and experience of mankind does not enable them to see what inferences should be drawn from the facts, that the witness may supply opinions as their guide. But on what ground it can be said that it requires the peculiar science or professional skill which physicians and surgeons possess, to determine the position in which a man may be struck on the top of his head, I am not able to perceive.

I think, therefore, that the ruling which permitted the answer to those two questions was erroneous. If the position of the body when the blows were struck was material, it should have been left to the jury to infer that position from the facts which tended to show it (The People *v.* Rector, 19 Wend. 569; The People *v.* Bodine, 1 Denio, 231; Wilson *v.* The People, 4 Parker's Cr. R. 619; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 78 ).

But under the circumstances of this case this error is of no importance, and furnishes no ground for reversing the judgment. The only possible bearing of the questions and answers lastly adverted to was on the inquiry, whether a murder had been committed. Whether the position of the body, when those blows were given, was erect, reclining, or prostrate, might in in some very slight degree bear on the question whether the deceased was injured by an accidental fall, or died by violence inflicted by his own hand; but when once it is assumed that he died by murder, these inquiries become wholly incompetent and immaterial. They have not the slightest bearing on the question *who* committed the crime. Standing, sitting, or lying down, the deceased was murdered, and, in which ever position, it is alike wholly uncertain *who* struck the fatal blow. Other circumstances might point to the prisoner, but these no more pointed to him than to any other human being of strength sufficient to give the blow. It is therefore conclusive, on the immateriality of the errors referred to, that it appears by the case that the fact of a wilful and deliberate murder was not finally a subject of contest before the jury.

In the beginning of the trial the counsel for the people gave the evidence referred to. He was then, in the opening of the case, establishing the primary fact that a murder had been committed.

At the close of the testimony, as we are informed by the Judge, in his charge to the jury, no embarrassing distinctions in reference to the nature of the crime were to be considered, and he says: "The murder that has been committed here is wilful and deliberate, *as is conceded on all hands.* The Defendant's counsel *concedes* that the murder, by whomever committed, is wilful and deliberate, and such is the charge in the indictment. . . . . This disposes of many questions, which are often found important and difficult questions for jurors to pass upon; and this leaves you with *only* the duty to say whether the Defendant, who has been indicted, is the guilty person who has committed wilful and deliberate murder. . . . The simple question for you to consider is, whether or not this Defendant is the man who committed this murder."

To all this there was no exception. It is entirely manifest (as was indeed expressly stated by the Judge) that the fact of wilful and deliberate murder was conceded. How then could the opinion of the Coroner, that the fatal blows were received by the deceased in one position rather than another, affect the prisoner? He wished no question submitted to the jury on which those opinions could have any possible bearing.

If I could see that such opinions could in the slightest degree, or by any possibility, have had any influence on the question, who struck the blows, the prisoner should not be suffered to bear that influence or its consequences. I am not able to perceive that it could have any such bearing, or to find any ground for saying that the error is not wholly unimportant. For these reasons I think the judgment below should be affirmed, and the record remitted, that the judgment may be carried into due execution.

GROVER, J.—It was decided at the last January Term of this Court (Fitzgerrold *v.* The People) that a general verdict of guilty, rendered upon a common law indictment for the crime of murder, authorized a judgment against the Defendant for

the crime of murder in the first degree, under the statute of the State. This disposes of the principal question relied upon for the reversal of the judgment in the present case.

The more material questions arising upon other exceptions taken during the trial will be considered. It is manifestly immaterial, when a person is known by two names, and the pleader, for greater certainty, deems it necessary to aver such fact in his pleading, which of the two names is first stated, and also, in such case, which was the real name, and which was afterward acquired. It is sufficient if the pleading designates the names by which the person intended may be known with certainty, irrespective of the priority of the statement.

It is insisted that the usual alias cannot be used in an indictment, for the reason that it is not English, and also, if this be not so, that the word does not, with sufficient certainty, convey the idea that the party was also known by the name thereafter expressed.

As to the first point, it may be remarked, that the word has been incorporated into the English language, and as such will not only be found in the principal dictionaries, defined with precision, but is also in use by writers, and in conversation, as an English word having the meaning given by lexicographers. That meaning is, where it appears between the names of a person, that the person is known by both names. That is a sufficiently certain averment of such fact in an indictment.

The opinion of the surgeon as to how the body of deceased was got into the position in which it was found, and as to the position of the deceased when the blows upon the head were inflicted, was incompetent.

The witness testified that it was mere opinion, unaided by his knowledge or skill as a surgeon. He was therefore no more competent to give an opinion upon these questions than any other person.

Were these questions, or either of them, in any possible view, material upon the trial, the exceptions to the evidence would have been well taken. I can see no possible materiality in either. The evidence precluded every possible idea of suicide, and also every idea that the blows were inflicted in self-defence.

It being an unquestioned case of murder, by whomsoever inflicted the blows, it was wholly immaterial how the murderer got the body into the cellar, and placed it in the position as found after death, or whether the deceased was sitting, in a stooping posture, or in any other position, when the blows were given.

The evidence having no tendency to prejudice the Defendant, the exception was not well taken. The evidence of the quantity of produce sold by the deceased, the fall previous to the murder, was competent. The prosecution had the right to show that the motive of the murderer was the hope of gain. This evidence had a tendency to show that the motive of the murderer was the hope of gain.

This evidence had a tendency to show that the deceased had money or other valuable property in his house, where he lived alone.

The same remark is applicable to the testimony of his nephew, that he had brought gold from England, and delivered it to the deceased. The time that had elapsed after such receipt of gold by the deceased was for the consideration of the jury.

It was not so long that the Court could determine that it had no tendency to show that deceased, at the time of the murder, had money or other valuable property in his possession.

The declarations of the deceased as to the money in his possession were properly excluded. There was nothing to obviate the objection that they were mere hearsay. The opinion of the witness who conversed with the prisoner while in jail, that he was innocent, was properly excluded. This requires no examination.

The circumstances under which he had the conversation with the Defendant, proved by the District-Attorney, could not have any effect upon the point in question.

I have examined the remaining exceptions, and none of them are well taken.

The judgment appealed from must be affirmed.

All affirm, except MASON, J., not voting.

Affirmed.

JOEL TIFFANY,
State Reporter.

# MARTHA ERNST, EXECUTRIX, &C., OF HENRY ERNST, DECEASED, RESPONDENT, *v.* THE HUDSON RIVER RAILROAD COMPANY, APPELLANT.

*Contributory Negligence—Nonsuit—Question for Jury.*

A traveler approaching a railroad track crossing the highway is bound to use his eyes and his ears so far as there is opportunity.

Negligence in the railroad company in omitting to give proper signals of the approach of a train, will not excuse the traveler's omission to use such means of avoiding collision. And where by such use of his senses the traveler might avoid collision, his omission to do so is concurring negligence, and should be so declared by the Court; where proof of this is clear the Plaintiff (alleging injury by collision with the train) should be nonsuited.

But where it is doubtful, under all the proofs, whether the traveler did or did not look up and down the track, and in other respects use ordinary care and prudence, so that honest and intelligent men may reasonably differ in their conclusions, the question whether the Plaintiff was negligent should be left to the jury.

It cannot be said that it is the duty of a railroad company to place a flagman or display a flag at a street-crossing to notify travelers or foot passengers of the approach of trains. Doing so may enable the trains to be properly run at greater speed, and with less caution on the part of those who conduct the train, but it is not a duty.

But the voluntary and uniform practice of the company to display such flag at a particular crossing, generally known to persons using the street, may render its omission a culpable neglect, unless increased vigilance and care in the management of the train, or other precautions, furnished equivalent assurance of safety.

CLERKE, J.—This action was brought to recover damages

---

*Railway crossings—Contributory negligence.* 38 *N. Y.* 442; 40 *N. Y.* 11; 41 *N. Y.* 299; 42 *N. Y.* 473; 44 *N. Y.* 469; 45 *N. Y.* 664; 7 *Hun,* 562; 14 *Abb. N. S.* 30; 39 *How. Pr.* 414; 8 *Daly,* 291.

*Railway crossings—Neglect to give signals.* 78 *N. Y.* 524; 1 *T. & C.* 246; 15 *Hun,* 502; 6 *Abb. N. C.* 125; 8 *Daly,* 223; 15 *St. Rep.* 880 (1 *N. Y. Supp.* 269; 28 *Week. Dig.* 572).

*Street Railways—Duty of drivers—Obstructions.* 2 *Misc.* 540 (51 *St. Rep.* 592; 22 *N. Y. Supp.* 382.)

*Negligence—Question for jury.* 8 *Abb. N. S.* 210; 1 *Sweeney,* 573; 37 *Hun,,* 297.

against the Defendant for negligently causing the death of the Plaintiff's testator, and has been tried four times. Upon the first trial the Plaintiff was nonsuited. A new trial having been granted, the cause was tried a second time, and the Plaintiff recovered $2,500, upon which judgment was entered. This was reversed in the Court of Appeals, and a new trial ordered. On the third trial the Plaintiff was nonsuited, in accordance with the decision of this Court. This was affirmed at the General Term; but, on a second appeal to this Court, the judgment of the Supreme Court was reversed, and a new trial ordered. On the fourth trial the Plaintiff had a verdict for $5,000.

The judgment upon this verdict having been affirmed at the General Term, the Defendant appeals to this Court.

The Judge at the trial charged the jury that the first question which they were to consider was, whether the Defendant was guilty of negligence which caused the death of the Plaintiff's testator. On this question there was conflicting evidence. The Plaintiff's witnesses, and some of the Defendant's, testified that they did not hear the bell or whistle previous to the accident; while the engineer, fireman, and track-master testified that these signals were given. So that the question relative to the Defendant's negligence was properly left to the jury.

The Judge added, that if they should come to the conclusion that the Defendant was guilty of negligence, then the question would be, was the deceased free from negligence which contributed to the accident?

The Defendant's counsel asked the Court to charge—"If the deaceased by the use of ordinary faculties, could have discovered the train, and avoided the injury, he was guilty of negligence, and cannot recover," and this the Court accordingly charged.

The counsel for the Defendant moved, at the conclusion of the Plaintiff's evidence, for a nonsuit on the ground—"1st, That there was no proof of negligence on the part of the Defendant;" and, "2d, That it appeared that the negligence or want of care of the Plaintiff's testator contributed to the injury." The motion was denied; it was, however, renewed at

the close of the whole evidence, and was then also denied. As I have already intimated, there can be no doubt that the question regarding the Defendant's negligence was properly left to the jury. The second ground for the motion for the nonsuit is more plausible, on the legal proposition which this latter question involves. I cannot discover any difference of opinion between any of the Judges by whom this case has been considered. All seem to assume—at the trial, at the General Term, and in the Court of Appeals—that the Plaintiff must make out a clear affirmative case of negligence on the part of the Defendant, unaccompanied by any negligence on the part of the deceased, that contributed to the injury; and the question now is, was the negligence of the deceased so obvious and uncontradicted by the evidence, as that nothing was left on this point for the consideration of the jury. I cannot find any substantial difference in the evidence bearing on this point adduced at the trial before the last, and the evidence adduced at the last trial.

There were some more witnesses examined on behalf of the Defendant. Their evidence, perhaps, tended to contradict that of the Plaintiff, but by no means made it more manifest that the Judge should have nonsuited the Plaintiff, on the ground of the uncontradicted negligence of the deceased.

At the last trial all the facts were proved which were proved at the one that preceded it; and these were very succinctly stated in the following synopsis contained in the opinion delivered by Judge Hunt, when the case was last in this Court:

"On the day in question the deceased drove his empty sleigh, with a pair of horses, into the village of Bath, intending to cross the ferry to Albany. The boat was not ready, and he fastened his horses in the front of the tavern, and went in. In a short time notice was given that the boat was ready; his associates crossed over the track in their sleighs, one of them remaining near the track to assist the deceased, the others reaching the boat. The deceased came out, unhitched his horses, sat upon the bottom of his lumber sleigh, drove northerly a few feet, turned westwardly, drove one hundred and twelve feet towad the ferry, when he reached

the railroad track, when his horses were struck by the engine and cars going southwardly, his horses killed, and himself so badly injured that he died within a few days thereafter.As he drove northwardly from the hotel he could see up the railroad a distance of thirty rods. After turning westwardly, toward the ferry, and going a short distance, the view of the road northerly was cut off by the station-house—a building extending about fourteen feet in a direction easterly and westerly. As the deceased approached the train he was driving on a moderate trot; he was shouted at three times by a man standing on the steps of a store adjoining the track, that the cars were coming, to which he paid no apparent attention. Whether he heard or understood does not appear. One of the railroad hands east of the track made motions to him, intended by the maker as signals to stop; and one of his own comrades (Simmons), on the west side of the track, made signs intended by him to effect the same purpose. The deceased drove on at a moderate trot till he reached the track. The train, as one witness testified, was running at a speed of forty miles per hour, which would carry the train over the thirty rods in about eight and a half seconds, and over fifty rods in about fourteen and one-sixteenth seconds. The deceased was a frequent passer at this place; and it had been the established custom there for some years, that a flag-man, with a white flag, should signal the approach of cars not intended to stop, and with a red flag when the train was expected to stop."

On these same facts, which appeared on the trial that we are now reviewing, we are now asked to decide that the Judge should have nonsuited the Plaintiff, when, by the decision rendered by this Court, on its last consideration of the case, it was held that the facts were sufficient to carry it to the jury.

No new proof has been given or withheld; no circumstances have occurred which could justify us for a moment to overrule the former decision. Nothing could justify this but a very palpable misapprehension of the facts, or a very palpable mistake of the law. At neither trial, indeed, was there any positive proof that the deceased directed his vision

up or down the road. But may he not have done so?—nay, do not the circumstances make it probable that he did so before he reached the station, which then obstructed his view?

We have seen that as he drove northwards from the hotel, he could see up the railroad a distance of thirty rods; and then, seeing no approach of the train, nor anything indicating its approach, he ventured to cross. We are to infer from the verdict at the last trial that the jury decided that no whistle was sounded, and no bell rung as the train approached the crossing. Now, if even there was positive proof that the deceased neglected to look up and down the track, would it be negligence in him not to have done so, in the absence of the customary and legally required signals? I am not aware that this Court has decided, or that there is a current of authority anywhere deciding, that when a railroad company neglects to give these signals, the want of ordinary care can be imputed to a person crossing the track, if he omits to look up and down just before he crosses. The absence of the accustomed signals is calculated to impart an assurance of safety, particularly to one who is in the habit of crossing the same spot frequently, and who perhaps has never before known of their omission. And can it be correctly alleged that he is guilty of negligence if he abates his usual vigilance under such circumstances?

I think it would not be unreasonable to recognize such negligence on the part of a railroad company as a proper element for the jury, in considering all the circumstances relating to the question on the part of the deceased. Any contributory negligence of a person attempting to cross, no doubt excuses the company, whether it does or does not use the required signals, or is, or is not, guilty of any other negligence. But I repeat, is it reasonable to impute negligence to a person who frequently, for years, is accustomed to hear signals, if he omits, on one occasion when they are withheld, to look up or down the road, immediately before crossing? At all events, there is nothing in the proof to show that the deceased neglected to look when his horses, on turning them round from the place where they were hitched, faced the

north, and when he had an unobstructed view of the crossing, and of the railroad track for thirty rods north of it.

The fact that the witness failed to observe that he afterwards did not look up or down the track is not of itself certain proof of the want of ordinary care on his part.

In my opinion this Court, in its last review of this case, in no respect relaxed the salutary rules which it had in many previous cases adopted, in relation to the negligence of persons who are on railroads. In neither of the opinions delivered on that occasion is the rule ignored or modified, that when the injured person has not used ordinary care, there can be no recovery against the company.

They only in effect intimate, that what is want of ordinary care is a question depending, for the most part, upon the facts and circumstances of each particular case.

The last decision in this case (35 N. Y. R. 9) is not, I think, at variance substantially with the legal propositions and deductions of the previous decision (24 How. P. R. 97).

The latter was based, evidently, on a mistaken statement of the facts, which, if true, would have justified the Court in concluding that the deceased was guilty of negligence. The real facts, and the facts which were proved at the last trial, I repeat, authorized the Judge to send the issues and evidence to the jury, in conformity with the decision of this Court in its last review of this case; and if he had not done so, the nonsuit would unquestionably be set aside.

The judgment should be affirmed, with costs.

WOODRUFF, J.—Without attempting to extend discussion in a case which has been the subject of repeated and extended discussion already, I propose to state briefly the propositions to which my assent is given—for, in my judgment, the case itself involves rather the application of settled principles of law to the evidence, than any serious contest about the principles themselves.

1st. That the Plaintiff was bound to prove that the Defendants were guilty of negligence; and that an omission to

ring the bell or blow the whistle on approaching a road crossing is negligence, is not disputed.

Whether, in this case, the Defendants did or did not ring the bell was in dispute, and the testimony was conflicting. It was therefore proper to leave that question to the jury.

2d. The charge of the Judge seems to assume that it was the duty of the Defendants to keep a flag-man at the crossing, to give notice of the approach of the train, and that their omission to do so is, per se, negligence. There is, I think, no such rule of law, and the Court would not be warranted in giving such an instruction to the jury. It cannot be said, affirmatively, that any such duty rests upon the company. No statute requires it. The company have the right to run their trains carefully and prudently on the track which they are by law authorized to construct and use; and if they do this, then it is the duty of those who have an equal right to use the highway at the crossing to avoid them, provided they give the warning prescribed by the statute.

In determining whether the company were duly and reasonably careful in the running of their trains, it is not necessarily enough, under all circumstances, that they give the statute-warning. The rule of the common law, prescribing reasonable care in the exercise of their own right, that others also in the careful exercise of their own rights may not be injured, still rests upon them; and in special circumstances, where the danger to others is greater, as in cities or towns, the rule may require them to slacken their speed and move their ponderous engines with very great caution and circumspection, because they are so powerful for harm. But, doing this, it cannot be said that they are also bound to place a man at the crossing, in addition to such care and caution.

True, if the company elect to do so, as they may for their own convenience, they will thereby render it proper to run with greater speed and less caution on the part of the managers of the train. But the law does not require it, however stringent in requiring care in the management of the train itself. But there is no exception to the charge in this respect.

Besides, the company, by their own practice, may make a law for themselves. If they had an established and hitherto uniform practice on the subject, which was notorious and known to be so, then to withdraw the flag-man when their own conduct had justified the expectation of all who were in the habit of using the highway, that warning by the flag would be given, would be a neglect of suitable precaution, unless increased vigilance and care in the management of the trains, or the employment of other means, furnished equivalent assurance of safety.

3d. That if the testator was guilty of negligence contributing to the result, the Plaintiff was not entitled to recover, is not denied. This was so charged on the trial. The question is here, do the proofs clearly establish such negligence, so that the Court should have granted a nonsuit, or given a peremptory instruction to find for the Defendants?

Whatever I might conclude to be the preponderance of the evidence, the case seems to me one in which, upon this question, honest, intelligent, and impartial men may rationally differ. And if the doubts be such that such men, acting under a sense of great responsibility, and with a single purpose to arrive at the truth, may reasonably come to opposite conclusions, then it is proper to submit the question to the jury, and a nonsuit should not be ordered by the Court.

A traveler approaching a railroad track is bound to use his eyes and his ears, so far as there is opportunity.

Negligence in the railroad company in the giving of signals, or in omitting precautions of any kind, will not excuse his omission to be diligent in such use of his own means of avoiding danger; and where, by such use of his senses, the traveler might avoid danger, nothwithstanding the neglect to give signals or warning, his omission is concurring negligence, and should be so peremptorily declared by the Court; and where proof of this is clear, the Plaintiff thus negligent should be nonsuited.

But where it is doubtful, as I think it is in this case, under all the circumstances testified to, whether the traveler did or did not look up and down the track as far as he could see it—

whether, in the short distance he had to drive, he could, if he did look, see the approaching train—whether this train came into view (considering the speed at which it was running, according to the testimony of some of the witnesses) until the moment when he reached the station-house, where his view was necessarily obstructed—whether he was not misled by the failure of the company to show the flag, as they had been accustomed to do—whether the attempts made to stop him were not, under the circumstances, liable to misinterpretation, and might not be reasonably interpreted by a cautions person to be intended as stimulants to hurry him forward, so as to reach the ferry-boat then in waiting, instead of warnings to stop; and so finally the question, whether he used ordinary care and prudence, becomes so complicated and involves so many details, that honest and intelligent men, acting without bias, or partiality, in a single and sincere desire to determine according to the truth, may reasonably differ in their conclusions, then the question should be left to the jury.

For these reasons I concur in the results at which other of my brethren have arrived; viz. that the judgment should be affirmed.

BACON, J.—I concur in all respects in the foregoing opinion, and put my assenting vote for affirmance upon the same ground.

MASON, J.—I concur in this opinion in all respects, save that I prefer to express no opinion upon the question whether, under any circumstances, the railroad company should be required to place a flag-man at a road crossing.

All affirm, except GROVER, J.

Affirmed.

JOEL TIFFANY,
State Reporter.

## THOMAS N. PORTER, &c., RESPONDENTS, *v.* WILLIAM SPENCE, EXECUTOR OF WILLIAM SPENCE, DECEASED, APPELLANT.

*Contract—Parol Evidence—Ironmongery—Case on Appeal—Findings of Fact.*

Construction of a contract—meaning of "Ironmongery,"—admissibility of parol evidence of the time and circumstances of the drawing of a contract, and additions or supplementary clauses thereto, to throw light on the meaning and intention of the parties.

APPEAL from a judgment of the Supreme Court in the Second District, affirming a judgment in favor the Respondents in the City Court of Brooklyn, on the report of a referee.

The action was to recover for work and labor performed and materials furnished by the Respondents, as carpenters, upon a house of the Defendant, in Brooklyn, &c., claiming to recover $454.46. The answer denied any claim beyond the sum of $30, and also alleged that the work was performed at the request of one Bonnell, who was the contractor with Defendant for the construction of the house, and alleged payment to him.

The referee finds, among other things, that the Defendant requested the Plaintiffs (who were builders employed on the job by Bonnell) to make various alterations and additions to the work and materials employed in the construction of the house, and that they were done upon that request, and are of the value of $358.59, for which the Defendant, upon that employment and request, was liable, and for this sum he ordered judgment, with costs, which was duly entered, and the appeal therefrom taken as aforesaid.

*D. P. Barnard* for Appellant.
*John H. Reynolds* for Respondents.

BACON, J.—As the case is made up it is doubtful whether any question is presented to this Court arising out of the report of the referee.

The case contains no finding of facts and conclusions of law separate from the report, as the well-settled rule of this Court requires; nor is the report made any part of the judgment-record which comes up for review. The report itself contains but one or two findings of fact, &c.; the remainder consists of an argument or opinion, giving a construction to the terms of the contract of the Defendant with Bonnell, and vindicating the interpretation the referee put upon it.

There are exceptions to the findings of fact, but these we do not review, especially as there was no countervailing evidence on the part of the Defendant. If the facts are right, as we assume them to be, the conclusion is in evitable that the Plaintiffs were entitled to recover. Services were rendered by the Plaintiffs, and materials furnished by them, at the request of the Defendant, and applied and used for his benefit, and the law implies a promise, to which the referee has given effect by finding in favor of the Plaintiffs for a sum considerably less than the amount claimed by them. There is, in truth, but a single exception which is presented in such shape as to allow a review in this Court. Included in the report in favor of the Plaintiffs is the sum of $154.16, which is the amount of a bill for shelf hardware or ironmongery, furnished by the Plaintiffs, and used upon the building. The ground of exception to the finding in respect to this item is stated to be, that by the terms of the contract with Bonnell, the whole ironmongery for the house was to be furnished by Bonnell, and was included in the gross sum that he was to be paid for the entire work.

The same exception was taken in the course of the trial, and arises upon the terms and construction of the contract between the Defendant and Bonnell. The contract and specifications between these parties were put in evidence, and in the latter occurs this provision: "Ironmongery and all plumber work to be furnished by the owner [the Defendant], as also speaking-tubes, bells, gas and heating apparatus." This, standing alone, would seem to impose upon the Defendant the duty of furnish-

ing and paying for the articles specified; but at the end of the articles there is appended a clause in the following words: "It is understood that all ironmongery, &c., excepted in foresaid specification, are to be executed by said N. Bonnell [the builder], and as follows: 1st, for iron railings and anchors, $120; 2d, plumber work, $200; 3d, marble mantles and grates, $200; and included in the aforesaid sum of $5,200." The construction put upon this clause by the referee was, that the articles therein specified, and no others, were to be included in the compensation of $5,200 provided for the entire work; that, consequently, the items which proved the charge of $154.16, allowed by him to the Plaintiffs, were not within the contract, and they were justly entitled to recover them. Although the clause is not very artificially expressed, I think the meaning is obvious, and that the referee gave it the true construction. Taking the whole together, it provides that the particular things specified and sum mentioned shall be included in the compensation to be paid to the builder. The contract had specified what the owner was to furnish, and these articles which were provided and paid for by the Plaintiffs were included within the general designation of ironmongery, &c., and could only be excepted by a provision equally explicit elsewhere. The clause at the end of the specification is not only susceptible of the construction put upon it by the referee, but to give it any other would be to violate its plain import. The offer made upon the trial to show a reason from which it might be assumed that the Defendant desired to furnish these articles himself, under his contract with Bonnell, was an attempt by inference to put another construction upon the writing, in plain violation of the rule that a written contract cannot be varied by parol, and was properly rejected by the referee.

The judgment should be affirmed.

WOODRUFF, J. (dissenting.)—Two questions only are presented by the counsel for the Appellant for our consideration on this appeal.

First. Whether certain parol evidence should have been received, which, the Appellant insists, would have assisted in the construction of the written contract made by the Appellant for the erection of the house therein agreed to be built for him.

Second. Whether, according to the true construction of the contract (unexplained by such evidence), the Appellant was liable to pay the Plaintiffs for certain hardware used in such erection.

The latter question may conveniently be first considered.

By written contract, dated in 1853, the Appellant agreed with one N. Bonnell to perform all the work, both mason's and carpenter's, and furnish all the materials for the erection of a brick dwelling-house, according to the plans and specifications mentioned, and all to be done for the sum and consideration of $5,200—the whole to be completed on or before the 15th day of December, 1853.

To this is added—"It is understood that all ironmongery, &c., excepted in foresaid specifications, are to be executed by said N. Bonnell, and as follows: 1st, For iron railings and anchors, $120; 2d, plumber work, $200; 3d, marble mantles and grates, $200; and included in the aforesaid sum of $5,200." So far as the specifications throw light on this concluding clause of the contract, they show the following:

There were two specifications—one of what is called specification of carpenter's work and materials, giving size of house, height of stories, description of the timber and furring, the floors, roof, windows, and doors and hanging, and their trimming, describing with particularity the butts, locks, knobs, and various other details of hardware, the stairs, base-board, and various other details, and provide, in express terms, that "the fire places in second and third stories to have mantles of neat marble pattern, secured with iron hold-fasts; neat borders around all hearths;" and again, "tank, bath, sinks, trays, to be placed where shown on plans," giving some details as to each. And then provides—*"Ironmongery and all plumber*

*work* to be furnished by the owner, as also speaking-tubes, bells, gas and heating apparatus. The contractor will be required to do all the carpenter connected therewith; also fitting and putting on all locks, butts, weights, &c., on both doors and windows." The other specification is called the "mason's specification."

That also gives the size of the house, height of stories, describes the cellar-walls, the brick-work, coping, floors; brown stone ashler steps, platform, sills, caps, and lintels; blue stone flagging in yard and area; paving, cistern, lathing and plastering; and has a distinct specification of the "iron work" in the mason's specification; "Iron anchors to be spiked to the timbers in each tier of beams, . . . . good iron anchors to every course of ashler in front, and anchor on iron work for front stoop, . . . . grating over areas to cellar, both front and rear; cover to coal-slide, and chain, hook, and padlock; iron rings and tin covers to such flues as may be required." It then adds:

"The owner will furnish marble mantels, marble hearths, range and grates, and heating apparatus; also, all front railing of iron stoop and balconies; the mason to furnish all the rough materials that will be required for setting the same, and will finish after the plumber, trimmer, and gas-fitter, bell-hanger, and remove all rubbish from off the premises, and leave the building clean."

It thus appears (when the case is considered with reference to the face of the papers, unaided by any explanatory testimony) that there was an undertaking by Bonnell, in the body of the agreement, to do all the work and furnish all the materials according to the specifications, but that in those specifications were certain exceptions of materials and labor which the owner agreed to furnish, viz.:

"Ironmongery, all plumber work, speaking tubes, bells, gas and heating apparatus, marble mantels, marble hearths, range and grates, heating apparatus, front railings of stoop and balconies."

All these are, in the terms of the specifications, excepted from the undertaking of Bonnell, and had the agreement been signed without the concluding sentence, the Defendant would have been clearly liable for all of them.

What, then, does the concluding sentence of the agreement import?

"It is understood that *all ironmongery,* &c., excepted in foresaid specifications are to be executed by said N. Bonnell, and as follows: 1st, for iron railings and anchors, $120; 2d, plumber work, $200; 3d, marble mantels and grates, $200; and included in the aforesaid sum of $5.200."

It is not perfectly easy to say what provisions so apparently inconsistent do import without the aid of other evidence.

Upon the face of the agreement, it is provided that Bonnell should perform all the work, according to certain specifications, and that he shall execute all the ironmongery, &c., excepted therein. Those specifications describe the work and materials with particularity, and declare that certain of the materials the owner shall provide. It is the duty of the Court to give effect to all those provisions, if we can; and it is equally clear that the Court make take into view the situation of the parties, the subject-matter of the contract in its details, the builder's meaning of the term "ironmongery," if it have a special or restricted meaning among builders, and every extrinsic fact before the minds of the parties when the agreement was signed, if the agreement is, on its face, of doubtful interpretation, and such extrinsic facts will make its import apparent. On the other hand, it is certain that in respect to what is stipulated, the oral negotiations and the oral declarations, and the verbal agreements, cannot be proved so as to alter or vary the legal effect of what is written.

On the one hand it is claimed that this concluding sentence of the agreement is only a partial modification of the clauses of the specification which excepts portions of the materials from the undertaking of Bonnell; that it means simply, that

although iron railings, plumber work and marble mantels are in the specifications mentioned to be furnished by the owner, they shall be furnished by Bonnell, and be included in the price of $5,200 mentioned.

This is unsatisfactory, for several reasons. If this was the only meaning of the clause, what is the meaning of the several prices, $120, $200, and $200, annexed to each. Obviously, they were put there for some purpose, and I perceive no purpose they could serve except to define the character of these items by subjecting them to the test of *cost*—i.e., the iron railings and anchors which the contractor shall furnish shall be such as shall, at their proper cost, not exceed $120, and so on; but that cost shall nevertheless be covered by the aggregate price which the owner is to pay, viz., $5,200. Again, it rejects entirely the expression "that all *ironmongery*" excepted in the aforesaid specifications are to be executed by said N. Bonnell; for we are not to disregard the fact that this term, "ironmongery," is the very word which is used in one of the specifications to describe the exception, and it is *not* used to describe iron railings or anchors, plumber work, marble mantels or grates.

The "ironmongery" excepted is an exception in the "carpenter's specification." The iron railings, anchors, and grates, are especially described by name as to be furnished by the owner. They are treated as something entirely distinct from and additional to the "ironmongery" excepted already in the carpenter's specification. To treat the particulars, 1st, 2d, and 3d thus mentioned, as particulars under the head of ironmongery, &c., is to assign to it a meaning which is not given to it by the parties in these specifications, and for that purpose to make the word "ironmongery," in the only place in which it is used, viz., in the carpenter's specification, embrace what it did not embrace when it was inserted therein.

On the other hand, it is claimed by the Appellant that the expression, "It is understood that all ironmongery, &c., excepted in the foresaid specifications are to be executed by N

Bonnell," means that everything excepted in the specifications shall be furnished by Bonnell, and that this concluding sentence expresses the after-thought and final agreement of the parties. That it was intended to override, and does override the exceptions first made. That "ironmongery" here means just what ironmongery meant in the only instance in which it was used in the specification, viz., in the carpenter's specification, when it meant butts, hinges, bolts, locks, knobs, and other articles for which the Plaintiff in this action claimed to recover, and that the "&c." added thereto was added because some of the excepted materials were not ironmongery, but plumber's work, speaking tubes, marble mantels, marble hearths, &c., &c. That the specifications under the heads 1st, 2d, 3d, were not particulars under the head of ironmongery, and were not so classified in the specifications, and were not used to restrict the operation of this concluding sentence at all, save only in precisely the sense and meaning already above suggested.

The ironmongery, and most of the excepted materials, had been specificially described, and the contractor would see, without further description, what the contract required; but as to iron railings, there was nothing to define their weight or pattern, upon which their cost to the contractor would depend. That some would cost $3 per foot, others $10 and upwards. Cost was therefore agreed to as a test of their description, and and has no other intelligible purpose, since whatever they cost, they were included in the aggregate price of $5,200. These observations are entirely apt to the other of the three mentioned items, and most of all to marble mantels, of which the cost varies from $25 to $1,000, and even a much larger sum.

I am disposed to concur in this view of the construction of the agreement. But it seems to me that certain extrinsic facts would, if proved, have made this construction quite clear.

Suppose it could have been proved that the specifications were first prepared. That next, and by another hand, the

written agreement had been prepared, without this final clause, so as to bind the contractor to perform the work according to the specifications (and of course leaving all the excepted materials to be furnished by the owner). That upon examination of the papers, and in view of these exceptions, this added clause was inserted, and the price then also inserted. This would render perfectly harmonious the entire transaction. It would indicate either that the parties, or at least the architect that drew the specifications, contemplated the furnishing of the ironmongery, &c., by the owner, and that for some reason it was not so finally agreed, and that instead of revising the specifications, and erasing the various provisions to that effect, this short but summary mode of overriding the exceptions was resorted to, and made definite in regard to payment, by declaring that *all* ironmongery, &c., was included in the price of $5,200 to be paid for the building.

The offer of evidence by the Defendant embraced, in substance, this history of the contract, though not in the precise form I have supposed for illustration. I think it also embraced some particulars trenching on the rule that evidence to the oral negotiations is not admissible. It was competent to show the manner in which the papers were prepared, and the fact that this concluding sentence was an after-thought or alteration, and it was competent to prove any extrinsic fact known to the parties, by the aid of which this added clause might be applied for the purpose of construction to the papers as first drawn.

It is not claimed that if Bonnell was bound to furnish the hardware which is included in the Plaintiff's bill of particulars, the Plaintiffs, who were employed by Bonnell, can recover from the Defendant therefor. The other exceptions relate to questions of fact, but for the reason stated I think the judgment should be reversed, and a new trial ordered, costs to abide the event.

Affirmed. MASON, J., not voting.

JOEL TIFFANY,
State Reporter.

## SAMUEL T. CHAMPNEY, ADMINISTRATOR, &c, APPELLANT, *v.* FIDELIA BLANCHARD, RESPONDENT.

*Donatio Mortis Causa—Sufficiency of Execution—Mental Capacity—Evidence.*

The Defendant held in her possession certain moneys of her sister—the Plaintiff's intestate—for which she had delivered the following receipt:—

"Received, Brooklyn, May 21st, 1863, from J. Hegeman, twenty-eight hundred and three dollars and fifty cents. Also, June 1st, five hundred dollars, from A. S. Foster, both of which sums are on account of, and belonging to, Mrs. Mary Champney, and are to be disposed of in any manner she may direct, or paid to her individually, together with whatsoever interest I may obtain for their use.

"F. BLANCHARD."

The intestate in the morning of the day of her decease, in contemplation of death, delivered the receipt to the Defendant, declaring that she gave it to her, mentioning the amount, and saying that she gave that money to her. The Defendant received and retained the receipt.

In an action by the administrator of the intestate, *Held,* that this was a valid gift mortis causa.

A general objection made, when a deposition is offered in evidence, "to all such parts thereof as involve the opinion of the witness on the mental capacity of the deceased" raises no question for review on appeal. The objection should have been to specific answers. The Court cannot be called upon to scrutinize the various answers, to discover whether there are any to which such an objection would apply, and the Appellant's exception in such case is unavailing.

THIS was an action by the Plaintiff, as admistrator of Mary Champney, his deceased wife, to recover from the Defendant,

---

*Gift—Causa mortis—Essentials.* 55 *N. Y.* 72; 38 *Hun,* 166; 55 *Hun,* 190 (27 *St. Rep.* 947; 7 *N. Y. Supp.* 822, 24 *Abb. N. C.* 52); 65 *App. Div.* 595 (72 *N. Y. Supp.* 1032); 99 *App. Div.* 76 (91 *N. Y. Supp.* 364); 18 *Misc.* 625 (42 *N. Y. Supp.* 517); 18 *St. Rep.* 75 (2 *N. Y. Supp.* 675); 56 *How. Pr.* 50.

*Gifts—Delivery.* 88 *N. Y.* 257; 125 *N. Y.* 577 (35 *St. Rep.* 913); 2 *Hun,* 472 (5 *T. & C.* 89); 30 *Hun,* 635; 22 *App. Div.* 51 (47 *N. Y. Supp.* 875); 41 *App. Div.* 416 (58 *N. Y. Supp.* 781); 7 *Lans.* 109; 5 *T. & C.* 154; 3 *Misc.* 278 (52 *St. Rep.* 393; 22 *N. Y. Supp.* 781).

who was a sister of the intestate, certain moneys alleged to have been loaned to her by Mrs. Champney a few months before her death.

The intestate gave up business as keeper of a boarding-house in Brooklyn, in April, 1863, and sold her furniture and plate, the former for about $2,800, received by one Hegeman, and the latter for $500, received by one Foster. In the same month of April she went to New Hampshire, in feeble health, and died there on the 26th of June of the same year.

On the 30th of April she wrote the daughter of Defendant as follows:

"Mr. Hegeman has orders to pay all moneys to Mrs. Blanchard. . . . . Say to mother I have no will (destroyed it in John B. Stewart's presence the day before I left); she knows, or can know, how the law runs. As I am not out of the clutches of the estate of Eli Merrill, I think she best put the money to Foster's, in her own name, at present. When she comes on here she can give me her notes. By that time you may look about and see if it is best to use it in saving mother's. Do as you think best. Mr. Foster's advice is good, and so is Mr. A. Robbin's—none better. So I leave it, and do not feel any anxiety at all."

On the 14th day of May Mrs. Champney addressed an order to Mr. Hegeman, directing him to pay to the Defendant whatever sum of money might be in his hands arising from the sale of her furniture, deducting his charges; and upon the same paper the Defendant (May 21st) wrote her receipt to Mr. Hegeman for $2,803.50, in full for proceeds of furniture, as above.

On the 1st of June she received $500 from Foster, and about the same time deposited both sums in her own name at the Atlantic Bank, Brooklyn, where they remained intact until after the death of Mrs. Champney. Shortly after the 1st of June the Defendant signed and forwarded to Mrs. Champney, by mail, the following paper:

"Received, Brooklyn, May 21st, 1863, from J. Hegeman, twenty-eight hundred and three dollars and fifty cents. Also,

June 1st, five hundred dollars from A. S. Foster, both of which sums are on account of, and belonging to, Mrs. Mary Champney, and are to be disposed of in any manner she may direct, or paid to her individually, together with whatsoever interest I may obtain for their use.

"$2,803 50
500 00

$3,303 50

"F. BLANCHARD."

There was no revenue stamp attached.

This paper was in the possession of Mrs. Champney on the day of her death, and on the morning of that day she handed it to the Defendant, at her bedside, saying that she gave that to her (the Defendant); that it was the avails of her furniture. She also mentioned the amount at the foot of the paper, saying she gave the Defendant that amount.

The Defendant at the same time received the paper from the hands of Mrs. Champney, and retained it. The disease of which Mrs. Champney died was complicated, and of long standing, and had reduced her to a condition of great debility. The physician who attended her during her last sickness testified that he did not think she had a sound mind during the last two days of her life; that he did not consider her deranged, but, in his opinion, the debility of her mind rendered her unfit to transact business. On the other hand, the testimony of her nurse, and of two other unprofessional witnesses, tended to show that, though greatly prostrated in bodily strength, her consciousness and intelligence were unimpaired. These witnesses were with her during the last days of her sickness, were all persons of mature age, and had known the Defendant for many years.

The testimony of other witnesses was taken on commission, and when the depositions were introduced, counsel for the Plaintiff objected to all such parts thereof as involved matter of opinion on the subject of mental capacity.

The referee found as facts proved, the handing of the paper

to the Defendant by the deceased, and her accompanying declarations as narrated above; that it was in contemplation and expectancy of death, and with a view of giving the Defendant the money received by her as aforesaid, and that the deceased, at the time of the transaction, was of sound and disposing mind and memory, and of sufficient capacity to make a disposition of her property by will or gift. And he decided, as matter of law, that the transaction amounted to a valid gift to the Defendant, mortis causa, of the sums so received by her, or to an extinguishment of any claim upon her therefor, taking effect at the death of Mrs. Champney, and that her administrator could not recover the same.

Judgment was entered on the report in favor of the Defendant, which was affirmed at the General Term, and from which the Plaintiff appeals to this Court.

*M. S. Bidwell* for Appellant.
*J. M. Van Cott* for Respondent.

DWIGHT, J.—The referee has found as facts the intent of the decedent to give the moneys in question to the Defendant, her acts and declarations designed to effect such intention, and her capacity to make the gift; and each of these findings must be held conclusive, unless seen to be wholly unsupported by the evidence.

In respect to the last, it is claimed, on the part of the Appellant, that there is no legal and competent evidence to sustain it. It is said that the three witnesses relied upon by the Defendant to establish mental capacity were incompetent to give an opinion on that subject, and that, excluding their testimony, thus incompetent, there is left only the uncontradicted evidence of the physician, who testified that, in his opinion, the decedent was not of sound mind, nor of capacity to transact business during the last two days of her life.

But such is not the true state of the evidence on this question; the three witnesses referred to, do more than express opinions; they narrate the facts and occurrences of the day;

they describe the appearance and condition, and relate the words of the deceased.

The narrative of the very transaction in question—the giving of the paper to the Defendant, and the accompanying words of the deceased—was evidence on this point which the referee had a right to consider, and which, had he been sitting as Judge at the Circuit, he could not have withheld from the jury. But they gave other evidence equally admissible. They say: "She distinguished persons about her as usual." "She appeared to comprehend what she said and did, and what was said and done by others." "Whatever she said was rational and clear, and if I spoke to her her answers were correct and clear." "Her expressions were as intelligent as usual." "I did not observe any peculiarities in appearance, conduct, or conversation. She grew gradually weaker, but her mind held out wonderfully." And much more to the same effect.

These are not expressions of opinion, but statements of facts as they were observed by the witnesses, and they constituted evidence which must have been submitted to the jury, had there been one, and upon which the referee was warranted in finding competent mental capacity.

I do not examine the question raised upon the argument, whether persons, not experts in the phenomena of the mind, are competent to give an opinion on a question of mental capacity; because if there were any expressions of opinion in the testimony of these witnesses, which I doubt, the objection on the part of the Plaintiff was not specific enough to raise the question.

That objection was made before the deposition was read, and was to all such parts thereof as involved matter of opinion on the subject of mental capacity.

Such an objection cannot avail the party anywhere. The Court cannot be called upon to scrutinize the depositions of witnesses, and decide for the party to what particulars his objections shall apply.

In this case there was ample evidence of unquestioned competency to support the finding of the referee, that the intestate

was of sufficient mental capacity to make a disposition of her property by will or gift.

There remains to be examined, therefore, only the referee's conclusion of law, "that such transaction amounted to a valid gift to the ,Defendant, mortis causa, of the sums received by her, as aforesaid, or to an extinguishment of any claim upon her therefor." It may be observed that the referee, neither in his finding nor elsewhere in his report, undertakes to decide whether the original transaction, by which the moneys came into the hands of the Defendant, was a loan or a deposit, and probably it was unnecessary to decide that question; but to my mind it is clear that there was no loan, and no debt at the time of the gift.

The letter of the intestate, of April 30th, clearly imports that the money was to be held by the Defendant as a deposit. It advised, for reasons growing out of some circumstances in Mrs. Champney's own affairs, how the deposit should be kept, and indicated a probable future use of the money, to be determined upon when the parties should come together; while the receipt or memorandum of the Defendant, which was accepted by the deceased, and retained by her till the day of her death, distinctly characterizes the fund as a deposit to be held by the Defendant subject to the order of the deceased, and to be accounted for with only such interest as the Defendant might receive for its use.

In this view of the case, the question is not presented whether a valid gift can be made of a debt from the creditor to the debtor, by delivery of the evidence of the debt, without release or acquittance; though both upon principle and authority, I think, that question must be answered in the affirmative. But in this case the money of the decedent, of an amount ascertained by the memorandum then in her hands, was in the possession of the Defendant, held by her subject to the order of the decedent. Such being the case, what more was necessary or possible to effectuate a gift of this money to the Defendant than a delivery to her of the memorandum evidencing the amount and identity of the fund, accompanied by a

clear and explicit declaration of the donor that she gave her those moneys.

Delivery of the subject-matter is, no doubt, essential to a gift, either inter vivos, or mortis causa; but the object of delivery is to give possession, and in this case possession was already complete in the donee. No further delivery was necessary, nor was it possible, without first returning the property to the donor, that it might be redelivered to the donee—an idle and unmeaning ceremony.

I am therefore of opinion that the objection that there was no delivery of the subject of the gift is not well taken, and this, to my mind, disposes of all the questions in the case.

Gifts, mortis causa, if not favored by the law, are at least amply sustained by authority, in cases where the essential conditions are clearly fulfilled. These conditions are contemplation of death, clearly expressed intent to give in presenti, delivery of the subject-matter, and death of the donor without revocation of the gift—all of which seem to me to have been fulfiilled in this case.

The objection that the paper delivered by the decedent to the Defendant was void for want of a stamp, is without pertinency, especially in the view of the case taken by me, viz., that this paper was not the evidence of a debt, but simply a memorandum, evidencing the amount and identity of the fund which was the subject of the gift.

The judgment of the Supreme Court should be affirmed.

MASON, J.—This suit was commenced by the Plaintiff as administrator of his deceased wife, Mary Champney, who died intestate, to recover of the Defendant certain moneys which came to her hands from the said Mary Champney, the wife of the Plaintiff, and who was also the sister of the Defendant. The Defendant claims these moneys as a donatio mortis causa from her sister. The cause was tried by a referee, who sustained the gift, and gave judgment for the Defendant for costs. The Plaintiff appealed to the General Term of the Supreme Court, where the judgment was af-

firmed; and the Plaintiff appealed therefrom to this Court. The referee before whom the cause was tried, found the following facts:

"Mary Champney, who was the wife of the Plaintiff, and the sister of the Defendant, kept a boarding-house in the city of Brooklyn, in her own name and on her own account, and was the owner of furniture and silver-ware used in said house. Early in the year 1863, and a few months before her death, she discontinued said business and sold said property, and shortly thereafter went to board at Fitzwilliam, in the State of New Hampshire. The proceeds of the sale of the silver-ware were then in the hands of a Mr. Foster; and the money arising from the sale of the other property was in the hands of Joseph Hegeman, by whom, as auctioneer, the same had been sold. On the 30th of April, 1863, she wrote from Fitzwilliam to the Defendant's daughter, stating that Mr. Hegeman had orders to pay all moneys to Defendant, and requesting the Defendant to put the money in Foster's hands in her (Defendant's) own name. On the 14th day of May, Mrs. Chamney signed a written order, directing Mr. Hegeman to pay to Defendant whatever sum might be in his hands arising from the sale of her furniture, after deducting his charges. This order was sent by her to Defendant, and in pursuance thereof the Defendant, on the 20th of May, 1863, received from Hegeman the sum of $2,803.50, and gave him her receipt therefor. She also received the sum of $500 from Mr. Foster (in his hands as aforesaid) about the 1st of June, 1863. The Defendant deposited the two sums received by her, as aforesaid, in the bank to her own account, at the time of the receipt by her of said sums respectively; and said sums remained in the bank to her credit till after the death of Mrs. Champney, as hereinafter stated. On the 17th day of June, 1863, the Defendant executed a paper in the following words and figures, to wit:

" 'Received, Brooklyn, May, 21st, 1863, from J. Hegeman, twenty-eight hundred and three dollars and fifty cents. Also, June 1st, five hundred dollars from A. S. Foster, both of

which sums are on account of, and belonging to, Mrs. Mary Champney, and are to be disposed of in any manner she may direct, or paid to her individually, together with whatsoever interest I may obtain for their use.

" '$2,803 50
500 00

---

$3,303 50

" 'F. BLANCHARD.'

"And on the 18th day of June, she caused the said paper to be mailed to Mrs. Champney, at Fitzwilliam, and it was received by Mrs. Champney, and retained by her till she disposed of it as hereinafter stated. The paper had no revenue stamp upon it. Mrs. Champney being very ill, and supposed to be failing, the Defendant went to Fitzwilliam to visit her, arriving there about the —— day of June. Mrs. Champney continued to fail, and died on the evening of June 26th.

"On the morning of the day of her death, Mrs. Champney, in contemplation and expectation of death, and with a view to give to Defendant the amount received by her as aforesaid, handed her the paper, of which a copy is above set forth, saying that she gave that to her (the Defendant); that it was the avails of her furniture; she also mentioned the amount at the foot of the paper, saying she gave Defendant that amount. The Defendant at the same time received the paper from the hands of Mrs. Champney, and it was never returned to her.

"I find that Mrs. Champney, at the time of the transaction above stated, was of a sound and disposing mind and memory, having sufficient capacity to make a disposition of her property by will or gift.

"And I find and decide, as matter of law, that such transaction amounted to a valid gift to the Defendant, mortis causa, of the sums received by her as aforesaid, or to an extinguishment of any claim upon her therefor; the same taking effect upon the death of Mrs. Champney; that the Plaintiff, as her

administrator, cannot therefore recover the same of the Defendant.

"I accordingly report that the Defendant is entitled to judgment dismissing the Plaintiff's complaint."

As none of the findings of the referee in this case are wanting in evidence to sustain them, we can only review his conclusions of law from the facts found. The rule is well settled at the present day that choses in action, or, at least, instruments creating a liability against a third party, held by the donor, are the subjects of a valid donatio mortis causa. And the Amercian cases conclusively establish that the promissory note of a third person stands, in this respect, upon the same footing with a bond, and it matters not whether the note be payable to bearer or endorsed in blank, so that a legal title vests in the delivery, or whether it be payable to the donor only, and delivery vests but an equitable title in the donee (Brown, Exr. *v.* Brown, 18 Conn. R. 410, 413; 16 Vermont R. 206; 21 id. 238; 24 Pick. R. 261, 264; 15 Maine R. 429; 18 id. 225; 21 id. 185; 27 id. 196; 1 Paige, 316, 318; 4 Cush. R. 87; 33 N. Y. R. 581).

There seems to have been an attempt in the Courts of Westminster Hall to distinguish between a promissory note and a bond, in relation to the validity of the gift of a chose in action; but the Courts in this country hold that there is no difference —and there is none in reason or principle.

The gift of either is valid as a symbolical delivery of the *debt due on the note or bond;* and it is held that a note secured by a mortgage passes equally well by a gift and delivery mortis causa.

A bond or mortgage may also be transferred by mere delivery as a donatio mortis causa (Duffield *v.* Elwes, 1 Bligh, N. S. 497; Duffield *v.* Hicks, 1 Dow & Clark, 1).

The rule sems to be recognized as the same where the donee is the debtor, or bailee, or trustee of the donor, and that he stands upon the same footing as if the debt or duty were owing from a third person (Sims *v.* Walker, 8 Humphrey's R. 503, 505).

In the case of Richards *v.* Syms (Barnadiston's Ch. R. 90), which came before Lord Hardwicke in 1740, it was held that a bond and mortgage delivered by the mortgagee to the mortgagor, accompanied with the statement, "*Take back your writings, I freely forgive you the debt,*" was a valid gift of the moneys secured by the bond and mortgage to the mortgagor. In the case of Gardner *v.* Gardner and Others (22 Wend. R. 526), it was held that a bond for borrowed money to improve the separate estate of the wife could be discharged by a donatio mortis causa to the wife.

The case of Moore *v.* Darton (7 Eng. Law & Eq. 134) is quite like the present, and upon the most favorable view which can be taken of it for the Plaintiff, is an authority against the Plaintiff's action in this case, and will sustain this gift to the Defendant *as a valid donatio mortis causa.* In that case Miss Darton let Moore have £600, and he at the time signed and gave to her the following receipts:

"Received, 22d October, 1843, of Miss Darton, £500, to bear interest at £4 per cent., but not to be withdrawn at less than six month's notice.

"£500.

"(Signed) WM. MOORE."

"Received, 22d Oct., 1843, of Miss Darton, for the use of Ann Dye, £100, to be paid to her at Miss Darton's decease, but the interest at £4 per cent. to be paid to Miss Darton.

"£100.

"(Signed) WM. MOORE."

Underneath those receipts was written:

"I approve the above.

"BETTY DARTON."

In June, 1845, Miss Darton fell into a declining state of health. On the 18th of that month, being confined to bed, and being attended and assisted as lady's maid by one Ann Dye, she delivered those receipts to her, with directions to keep them until after her death, and then immediately upon her death, to give them to the said Wm. Moore, saying that her object was that she wished the debt or sum of £600 so due

from the said Wm. Moore to her should be canceled. Ten days after this occurrence Miss Darton died, having been all the time dangerously ill. The day after her death the said Ann Dye gave the two receipts to Mr. Moore. Held, a valid donatio mortis causa, and that the delivery of the receipts, under these circumstances, was operative as a gift of the debt, and a discharge of all liability to the legal representatives of the estate of Miss Darton.

The case at bar is still stronger for the Defendant, as the receipt in this case does not show a loan, and an agreement to pay interest, but constitutes the Defendant a mere depositary of these moneys, to be disposed of as Mrs. Champney might direct, or to be paid to her with whatever interest Defendant might obtain for their use. There can scarcely be said to be any agreement on the part of the Defendant to execute any trust in regard to the moneys.

There can be no doubt, I think, that this was a valid gift, mortis causa, of these moneys in the Defendant's hands; and I cannot see that any importance should be attached to the fact that this receipt was not stamped with an internal revenue stamp. The gift of moneys in the Defendant's hands was just as effectual, whether the receipt needed a stamp or not, or whether it was with or without one.

This receipt having been given in evidence by the Defendant, without any objection raised as to the want of a stamp, and none having been raised upon the trial, and no exception filed even on this account in the Court below, the objection cannot be entertained here, as the objection might have been obviated had it been taken in the Court below. The judgment should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

## MORTIMER PORTER, RESPONDENT, *v.* ELISHA RUCKMAN, APPELLANT.

*Testimony—Question—Responsiveness—Evidence—Clerk's Minutes.*

The engrossed minutes of a trial kept by the clerk of the Court are competent evidence of the beginning and end of the trial of another action, although his rough minutes, kept in Court while the trial was in progress, are destroyed.

CLERKE, J.—The only question before us relate to the admissibility of evidence.

The action was brought to recover compensation for legal services. The question before the referee was whether the Plaintiff had been guilty of neglect in his employment, in unnecessarily delaying and postponing the trial of several actions brought by the Defendant against insurace companies on policies of insurance. The Plaintiff, who was examined on his own behalf, was asked: "Why did you not try the case against the Union Company at the same time?" He answered: "Because Cutting, the counsel for Ruckman, wanted to try a vessel case first. I have no reason, except Cutting would not try it," &c.

He was then asked: "Was Mr. Ruckman there with his witnesses, ready to try his other cases?" He answered: "I remember he was at the other trial, which ended the 13th February, 1858," &c. "Whether Ruckman's witnesses were there then I do not know. He did not urge me then to go on with the other trials. I don't think he spoke to me. *If he did, I referred him to his counsel.*" The last part of this answer was objected to as not responsive to the question, and as not being relevant.

This is a very trivial objection. The purpose of the question was to show that Ruckman was ready and anxious then to try his other cases, and that the Plaintiff in this case unneces-

sarily delayed them. But the Plaintiff, in answer to it, says he did not urge him or speak to him about the trial, and then adds, by way of showing that the delay was not his fault, that, if Ruckman did speak to him, he referred him to Mr. Cutting, whom Ruckman had employed as counsel to try the cases. This, indeed, is not responsive in the precise terms of the question, but tends, if it has any effect, to acquit him of causing the delay, and that would make it relevant. Therefore, being relevant, although not responsive, the referee did not err in refusing to strike it out. It was a question of order merely, entirely in his discretion.

It is objected, also, that the attorney of the Union Insurance Company was allowed to prove that he thought he would have advised the company to settle with Ruckman, if Ruckman had given a bond to discharge the attachment which the Plaintiff in this case had issued against the Defendant and served on the company, in order to secure a lien on the amount which the company owed the Defendant.

This objection is also trivial; the answer could have had no effect on the decision of the referee.

As to the objection to the minutes of the Clerk of the Superior Court, they were introduced for the purpose of showing that the trial of a case, in which Mr. Cutting was employed as counsel, was commenced on the 18th of January, 1858, and that it continued until the 4th of February. It was admitted that Mr. Cutting was engaged as counsel in that case; and as he was the Defendant's counsel in some of the cases in which the Defendant complains of the Plaintiff's delay in not bringing them on to trial about that time, it appears to me that the evidence was relevant, in order to account for the alleged delay.

As to the objection that the minutes produced were copies from the original minutes, neither is this tenable.

It was proved that the Clerk of the Trial Term made rough minutes of the proceedings at the trial, which he afterwards transcribed into the book produced. The rough minutes were always destroyed; so that the book, into which they were copied

by the same clerk, became the authentice record of the proceedings.

I think the evidence was competent for the purpose for which it was introduced.

The judgment should be affirmed, with costs.

All affirm.

JOEL TIFFANY,
State Reporter.

JAMES S. SANFORD AND OTHERS, RESPONDENTS, v. ELISHA RUCKMAN, APPELLANT.

*Evidence—Deposition.*

CLERKE, J.—The only point deemed worthy of any consideration at the argument, either by the Court or the counsel, was the 5th of the Appellant's points.

It was objected that the Plaintiffs offered the deposition of one Jennett, taken before a Commissioner of the District Court of the United States, in the proceedings of that Court against the brig Radius, to show that in fact the Defendant retained the Plaintiffs to prosecute that proceeding.

From the case as printed (p. 305), it indeed appears that the Plaintiffs offered the copy of the deposition of Jennett in evidence. But on the argument it was ascertained and admitted that this was a mistake; and some copies of the cases were amended so as to correct this.

It was corrected so that it showed that Plaintiffs offered the release affixed to the copy of the deposition of Jennett—not the deposition itself.

On referring to this release we find it was executed by Ruckman, and it was introduced for the purpose of showing that he was the owner of the brig Radius, by his own admission, which, the Plaintiffs alleged, Ruckman had employed them to defend in that admiralty suit; and for the services rendered in this employment, as well as for services rendered in other actions, this action is brought.

The judgment should be affirmed, with costs.

This opinion was not concurred in, and the judgment was reversed by HUNT, Ch.J., and GROVER, WOODRUFF, MILLER, BACON, MASON, and DWIGHT, JJ.

JOEL TIFFANY,
State Reporter.

# ROBERT H. McKIBBIN, RESPONDENT, v. HORATIO N. PECK, APPELLANT.

*Contract—Freight Money—Insurance—Loss in Transitu—Rights of Carrier.*

Where an insurance was effected on goods by request of the shipper, at the place of shipment, and made payable, in case of loss, to the owner or his shipping agent, the circumstances that the sum insured was, by request of such agent, made sufficient to cover the cost of the goods and the freight to their destination, does not create any presumption that the carrier's interest in the freight was protected, nor entitle the carrier (after a loss on the voyage and payment of the sum insured to the owner of the goods) to maintain an action against the latter for so much money had and received to his use.

The voluntary payment of the premium by the carrier to the insurance company after the loss, does not affect the question.

Where in such case the boat containing the goods was, without any fault of the carrier, sunk on the voyage in a canal-basin, and the goods were damaged, but the carrier was ready and willing, and offered, to render all due assistance in recovering the goods, and to carry them forward to their destination, in full performance of his agreement to carry, but, the owner having surrendered all his interest in the goods to the insurance company, the agents of the latter accepted the damaged goods at the place of the accident, and voluntarily relieved the carrier from his duty to carry further—*Held,* that the carrier was entitled to freight, pro rata itineris.

As between the owner and the carrier, the act of the insurance company in accepting the goods at the place of the accident, is to be deemed warranted by the owner's surrender of his interest to them, and, therefore, to be the act of the owner himself; and he is, therefore, liable to the carrier for a just proportion of the whole freight, pro rata itineris.

THIS was an appeal from the judgment of the General Term, affirming the judgment entered in favor of the Plaintiff upon trial at the Erie Circuit.

It appeared that on the fifteenth day of November, 1860, the Plaintiff was the owner of the canal-boat Brooklyn, and on that day he received on board of said boat, at Buffalo, five thousand eight hundred bushels of white wheat, to be transported to the city of New York, at twenty-two cents per bushel, which was shipped by James D. Sawyer, and bills of lading given therefor, consigning said wheat to the Defendant, care L. Roberts & Co., New York. Pease & Trowbridge were forwarding and com-

mission merchants, doing business in Buffalo, and they had an arrangement with the Plaintiff in respect to loading his boats, and procured for him the said wheat for transportation. Duplicate bills of lading were made, one signed by Sawyer, and the other by Pease & Trowbridge, one of which was returned by them, and the other given to Sawyer.

They also made a skeleton bill of lading, and gave it to the captain of the boat to take with the cargo, and ordered, at first, $7,000 to be insured on the cargo, and brought the certificate of insurance therefor to Mr. Sawyer, who figured up the cost of the wheat and of the transportation, and told Pease & Trowbridge they must procure $1,000 further insurance to cover the cost of the freight of the wheat to the city of New York. They then took the certificate of insurance back to the office, and procured another insurance, by which Pease & Trowbridge were insured under policy No. 209, issued by the Resolute Fire Insurance Company for $8,000 on cargo of wheat on board of boat Brooklyn, in manner as follows: $5,500 at and from Buffalo to New York; $2,500 at and from Troy to New York; loss, if any, payable to James D. Sawyer.

The policy referred to in the certificate No. 209, was an open policy of insurance, issued by the Resolute Fire Insurance Company of New York to the Plaintiff. This policy contained a provision, that on occurrence of damage to a boat, endangering the cargo, it should be the duty of the captain and crew, or those having command, to use the utmost diligence and attention to save the property until some agent of the company should arrive, and upon his arrival to assist him in the care and saving of the property; and neglect to do so would render the policy void. It also contained this provision: "And it is understood there can be no abandonment of the subject insured." Another provision was: "In case of wet grain, the dry portion in the boat, if any, to be considered as a sample of the condition and quality of the cargo when shipped, and the said loss or damage to be *estimated according to the true and actual cash value* of said property at the place of destination on the day of

the disaster; and on property not forwarded to its destination, the said loss or damage to be ascertained in the same manner, and the freight from the place of the disaster to the place of destination to be deducted." The arrangement between the Plaintiff and Pease & Trowbridge was this: The Plaintiff had a certain number of boats that season running between Buffalo and New York, and the agreement was that Pease & Trowbridge should, as agents for the Plaintiff, obtain lading for those boats, for which services they were to receive a commission. That the freight should belong to the Plaintiff, and should be collected in New York by Plaintiff's brother, H. McKibbin. This boat, with her cargo, was sunk on the 2d December, 1860, at Albany Basin, in the Hudson River. Captain L. B. Fortier acted as agent for the insurance company. His business was that of inspector, and to act as agent of the company in taking care of damaged property, and he was sent to Albany by the agents of the insurance company who issued the policy, to see to the cargo in question.

Sawyer was the agent of the Defendant in shipping the wheat, and the Defendant was at Buffalo when it was shipped. The Plaintiff, immediately after the disaster, went to Albany, and there met Fortier, and told him he had two empty boats in New York, and could send them up and have the wheat transferred into those boats.

Fortier replied that he thought of having the wheat kiln-dried in Albany. Fortier told the Plaintiff that he thought it would be better to take the wheat to New York in boats then at Albany, and thus save the expense of bringing up those boats, and it was done. Plaintiff offered to take the wheat down.

On the 10th December, 1860, L. Roberts & Co., to whose care the wheat was consigned for the Defendant, gave the insurance company notice of the loss, and that they abandoned to the company all title and interest in the cargo; and on the 5th January, 1861, the insurance company settled with L. Roberts & Co. for the loss, and paid them the amount thereof

for the Defendant, which loss was arrived at upon the following basis, and an account thereof made as follows:

New York, January 5th, 1861.

Insurance Company,

In account with L. ROBERTS & Co.
Produce Commission Merchants.

| | | |
|---|---|---|
| To 5,800 bushels of white wheat, cargo boat Brooklyn, sunk December 2d, 1860, near Albany, $1.33..... | | $7,704 00 |
| Less 5 cts per bushel freight from place of accident to New York,..... | $290 00 | |
| Less per policy..... | 50 00 | 340 00 |
| | | $7,374 00 |

The value of the wheat in the condition it was shipped, if it had arrived in New York on the day of the accident, or within two or three days thereafter, was admitted to be $1.33 per bushel.

The insurance company settled and paid the loss in accordance with the above statement. They paid $5,000 upon the loss on the 3d of January, 1861, and the balance on the 8th of March, 1861, deducting interest on the $5,000 paid in advance, no part of which was due, according to the terms of the policy, until sixty days after notice and proof of loss.

The premium for this insurance was paid by the Plaintiff, on or about the 1st day of December, 1860.

The action was brought to recover for the freight earned in the transportation of the wheat, or rather the amount received by the Defendant of the insurance company, on account thereof.

The certificate of insurance was endorsed by Sawyer in blank, and delivered to the Defendant, and he remitted it to L. Roberts & Co., who adjusted it with the insurance company, and received for the Defendant the insurance money, in accordance with the foregoing statement, L. Roberts & Co. being at the time under acceptances, and having advanced for the Defendant, but not on this particular cargo.

The Plaintiff had a verdict for $967.41, being the excess received by the Defendant on the policy of insurance, over and above the value of the wheat in New York at the time it should have been delivered, deducting from such value twenty-two cents per bushel for transportation thereof, and making proper allowances for interest.

The questions raised appear in the opinion. A judgment was entered, and appeal taken to the General Term of the Supreme Court, which affirmed the judgment, and Defendant appealed to this Court.

*J. H. Reynolds* for Appellant.

*George B. Hibbard* for Respondent.

MILLER, J.—The facts elicited upon the trial of this cause show that the Plaintiff agreed to carry the wheat by virtue of a contract made by his agents, Pease & Trowbridge, who had no actual interest in the contract, but who acted merely for the Plaintiff in procuring the cargo, and in effecting an insurance on the wheat and freight to New York for a sufficient amount to cover its value upon its arrival there. Although the certificate of insurance was in the names of the agents, and that fact was not disclosed, still it was effected for the Plaintiff's benefit, under an open policy, and the premium paid by him. Sawyer, the agent of the Defendant, to whom the loss was payable, if any occurred, was a mere appointee to receive the money for the parties who might be entitled to it.

As the freight was not paid, all the Defendant could have recovered would have been the value of the wheat at the place of delivery, deducting the amount of freight. The Defendant actually received upon the policy of insurance a larger amount than the value of the wheat in New York, and more than he was actually entitled to receive. What he received beyond this did not belong to him, and was the freight for the wheat which the Plaintiff, who had performed this service, if any one, was entitled to receive. The Defendant having thus received from the company the value of the freight (which should have been paid to the Plaintiff) without any legal or equitable right

thereto, I think that he received it as the money of the Plaintiff, and is bound to account for the same to the Plaintiff, unless there is some insuperable legal difficulty in the way. Such an obstacle, I think, does not exist in this case.

It sufficiently appears that the Plaintiff was really the insured party, at least to the extent of the freight, although nominally the certificate stated that Pease & Trowbridge were insured. The question whether the Plaintiff could recover upon the policy of insurance does not arise in this case; and whatever rule might apply if the action was brought directly upon the policy, it cannot now be claimed that the Plaintiff cannot recover because he was not nominally the insured party. Here the insurance company has actually paid the money, and the question to be determined is, who is entitled to that portion of it which remains after the Defendant has been paid the full value of the property lost? It matters not that the Plaintiff could not originally have maintained an action upon the policy, and it is enough that the Defendant received money which the Plaintiff had an equitable title to receive. The action is not really to recover for the freight pro rata itineris, as is claimed by the Defendant, but in substance, and in fact, is an action for money had and received by the Defendant.

It is claimed by the Defendant that parol evidence was not admissible to prove that the insurance was intended for any other person than the one for whom it is stated in the certificate to have been made. If an action lies to recover the money of the Defendant upon the ground that it was paid to him by the insurance company, and equitably belongs to the Plaintiff, as I think it does, then this objection cannot be sustained.

Even if this rule might be invoked, if the action was brought on the policy, it would not in my opinion be applicable in a case where the right to recover depends upon the equitable right of the Plaintiff to the money. The evidence was admissible for the purpose of showing who paid the money for the insurance; that Pease & Trowbridge merely acted as agents of the Plaintiff, and that the money in the Defendant's possession belonged to the Plaintiff.

In Dykers *v.* Townsend (24 N. Y. 57) it was held that a subscription by the agent of a party to be charged for stock purchased, is sufficient under the Statute of Frauds, though the name or existence of a principal does not appear upon the instrument; and parol evidence was held to be competent for the purpose of establishing that the subscription was in fact made by the Defendant. I think, therefore, that although the contract made was in the name of the Plaintiff's agent, it was, in fact, a contract made by the Plaintiff, and the objection urged is not available.

The question made, whether there was an abandonment of the property, was a question between the insurer and the insured only, and is not material; for if the money received by the Defendant was actually received for the benefit of the Plaintiff, then it is of no sort of importance whether or not there was an abandonment. There was, however, some evidence on that subject, and there was no error committed in submitting to the jury the question whether the cargo insured had been abandoned to the underwriters, on the behalf of the Defendant, and with his authority, or that he had subsequently ratified such abandonment, and secured the full amount of the insurance upon a settlement made on the basis of such abandonment. The evidence tended to show that the abandonment was authorized by the Defendant. Roberts & Co., the consignees of the Defendant, gave notice to the company to that effect; the company assented to it, and paid the money to the consignees, who paid it over to the Defendant. I am inclined to think that even if we concede that the consignees had no power to bind the Defendant by the abandonment of the property, which is not entirely obvious, that the Defendant sanctioned and ratified the act of abandonment by receiving the benefits of the insurance; and having thus acquiesced in it, he is not in a position to object to the act which he has approved, without first returning the amount received by means thereof. He is precluded from denying its force and validity.

It was competent to prove what took place between McKibbin, the Plaintiff, and Fortier, the agent of the insurance com-

pany, after the disaster to the vessel. What actually became of the cargo after the boat was sunk, was a part of the res gestæ. The testimony showed what disposition was made of the wheat, and the arrangement made in regard to it by the insurance agent. It may also be observed that what passed between Fortier and the Plaintiff was of no consequence, if the Defendant actually received an excess of money over the amount he could have recovered of the Plaintiff in an action brought by him for the loss of the wheat.

The testimony could not have changed the result, and the judgment will not be reversed for the admission of such evidence (The People v. Brandeth, 36 N. Y. 191).

The insurance was clearly intended to cover the freight, and, I think, it was not necessary that the freight should be insured eo nomine. By the policy the amount to be paid was the value of the property at the place of destination, deducting the freight from the place of the disaster on the property which did not reach its destination. This included the value of the freight, deducting reasonable costs of transportation to the place of destination. But if it did not, the amount was actually paid the Defendant by the insurance company, and having received it, he is not in a position to claim that it was not covered by the policy.

This discussion covers substantially all the questions raised and, I think, there was no error upon the trial, and the judgment should be affirmed.

WOODRUFF, J.—If the Defendant, being the owner of the wheat in question, had caused himself to be insured in Rochester or in New York, by a certificate of insurance, in the same form as was issued by the Resolute Insurance Company, and referring, for details of the contract, to a policy containing the same conditions as are found in policy No. 209, which was here referred to, I think it would hardly be claimed that the Plaintiff acquired or had any interest therein, or in the money which, in case of loss, would become payable to the Defendant.

It would have been a very simple case in which, up to a cer-

tain specified amount, the owner had insured his goods, and by the conditions of the policy the insured, notwithstanding the sum named in the policy, could recover no more than the value of the goods in New York; and if the loss happened before arrival, the freight from the place of loss to the city of New York must be deducted.

As between the owner and the insurance company, the freight between the place of loss and New York might become a material inquiry, and it might be wholly immaterial; but the amount of the freight or cost of transportation from the place of shipment to the place of loss could never come in question between them. Transportation of the goods towards a contemplated market does, in the expectation of the parties, increase the value. But whether it does in fact increase the value depends upon the state of that market and the price at which the goods can be sold after their arrival.

The rights of the parties under their contracts do not depend upon the actual price of the goods in New York, but upon the contracts themselves and the relations thereby established.

Now in the case just supposed—i. e., an insurance by the Defendant himself: suppose, by a rise in the market between the 15th of November (the date of shipment) and the 2d of December (when the goods were sunk), the wheat on the last-named day had been worth in New York ($1.70) one dollar and seventy cents per bushel, the Defendant, under his policy, could only collect the sum insured—$8,000—which is less than $1.39 per bushel, and the case would be free from the apparent element that the Defendant had collected from the insurance company the very freight which the Plaintiff claims in this action. But, as already suggested, if the Defendant had himself made the insurance, it would in no wise have concerned the Plaintiff that he had insured the wheat—whether he had insured it at one sum or another, or whether he had collected on such insurance more or less than its value.

The Plaintiff would have had no better claim than he would if the Defendant had sold the wheat at $1.33 per bushel, free of

freight and charges, the purchaser assuming all risk of loss or damage on the transportation.

And yet, in case of loss by the way, the Defendant might even in such case be said, in a loose sense, to have actually received the freight—i. e., he would have sold his wheat at New York price, which presumptively covers the cost of getting the wheat to the city. I am not able to discover anything in the form of the present insurance, or in the manner in which it was effected, that makes the case before us differ from the case I have thus supposed, or which warranted the submission of the question—whether the insurance was for the Plaintiff's benefit —to the jury.

By request of Sawyer (the agent of the Plaintiff, and shipper of the goods) Pease & Trowbridge (who had engaged the wheat for transportation in the Plaintiff's boat) insured the wheat in their own name, loss payable to the order of the shipper; and he endorsed the certificate of insurance to the Defendant's consignees. In this there is nothing to indicate that any one was to have the benefit of the insurance but the owner of the wheat. It was the wheat that was insured, not the freight thereon; the consignees stood in the place of the Defendant. The legal relations established by this form of making the contract made it an insurance of the wheat to a sum named, loss payable to the owner, and gave to him, or his consignees and factors for his benefit, a right to enforce the contract. I do not perceive that, on the consummation of the arrangement, Peck, the owner, stood in any other relation to the Plaintiff than he would if the policy, instead of being assigned to him, had been taken in his name.

It is, however, suggested that the proof showed that the sum insured was intentionally made large enough to cover the freight. Undoubtedly it was made $8,000, instead of $7,000, with an expectation that it would cover the whole value of the wheat to the owner, including freight and charges; and the amount was fixed by the shipper (not by the Plaintiff, nor his agents) for that purpose. But this does not show that it was intended as an insurance for the Plaintiff's benefit. It no more

tends to show that than would the fact that the Defendant, had he procured the insurance in New York in his own name, fixed an amount which he supposed would cover his whole risk in value, charges, and freight.

And so also, in the present case, as before, the policy fixing the value in New York as the utmost which could be recovered, the question whether in truth freight and charges were covered or not, would depend on the market price there on the day of loss; and on the other hand, as the sum insured was the limit of the indemnity which the Defendant could recover if the price in New York should advance largely, the recovery by the Defendant might not be equal to the value of the goods, irrespective of freight. That the fact that Sawyer, the Defendant's agent, desired the sum insured should be advanced to the sum of $8,000, so as to cover the freight, in nowise tends to establish any interest of the Plaintiff in the insurance money, is further apparent from the certificate of insurance, in its specification of the sum insured. Thus, the insurance was to the amount of $5,500 from Buffalo to New York, and an additional $2,500 from Troy to New York. That is to say, the insurance company would be liable to the amount of $5,500 if the wheat was lost between Buffalo and Troy, and to the amount of $8,000 if lost between Troy and New York. Now, suppose the wheat had been lost before it reached Troy. The utmost the Defendant could recover on the insurance would be $5,500, and yet the value of the wheat in New York, the place where, by the policy, the value was to be ascertained, was $7, 714; and with the deduction of the freight to New York $6,438. In such case the Defendant would recover $5,500, and submit to the loss of the difference. Where, in such case, would be the argument that the Defendant had collected the freight by virtue of the policy?

I deem it clear that, upon the face of the papers, and as matter of law, the Plaintiff has no interest in the policy, and no concern therewith.

True, the Plaintiff testified that *about* the 1st December (the loss having happened on the 2d) he paid the premium of insu-

rance. Doubtless, if it had not been paid, the insurance company, having given credit therefor from the 15th of November, would have deducted it from their payment of the loss. But the payment by the Plaintiff cannot alter the legal effect of the policy. It may entitle him to be repaid that amount. A carrier to convey the goods intrusted to him for carriage may be entitled to add insurance to his freight, but in order to do this he must show some request, or some usage, or some sanction, by way of affirmance; and it is doubtless true in this case that Pease & Trowbridge, who, at the request of Sawyer (Defendant's agent), effected the insurance, would have a just claim for the premium paid. And although I do not perceive any connection between the certificate of insurance and policy No. 209, except that, for brevity, that policy was, in respect of form, referred to for an expansion of the certificate, and as an exposition of the responsibilities assumed by the company, and of the conditions of that responsibility; still, as the Plaintiff paid the premium which Pease & Trowbridge, while acting as his agents in procuring freight for his boat, became liable for, and as that payment enured to the Defendant's benefit, I think he was entitled to be reimbursed by the Defendant. This discussion shows, as I think, that the insurance, and the amount recovered upon the insurance, is no guide to the determination of the rights of the parties. It is a perfectly well settled and familiar rule, that freight is not covered by insurance except when it is insured eo nomine; and yet it is entirely competent for the owner of goods to insure them, and agree with the insurers (as was done in this case) that the value at the place of destination shall govern the recovery, within the limits of the sum insured. Whenever the value at the place of destination is so agreed to, it does, in a sense, include the freight—that is to say, it includes whatever additional value the transportation has given to the goods, if any it be. But it does not insure *the freight,* either in form or in fact. Cases might be supposed in which such an insurance—the value at the place of destination being the measure of recovery—would not yield even so much as the freight.

On this branch of the subject the conclusion is, I think, inevitable. The question between the Plaintiff and the Defendant is *not* whether the Defendant has collected his insurance, but has the Plaintiff earned his freight? or has he earned freight pro rata itineris? For if he has, then, and in either case, the amount which he has recovered by the verdict is not greater than is earned.

By the contract the Plaintiff was to carry the wheat to New York, and freight would not be payable, according to the contract, if the wheat was not transported. An actual destruction of the wheat on the journey would deprive the Plaintiff of the opportunity to earn freight, wherever such destruction happened and although within sight of the city, and notwithstanding such destruction was by act of God, and without any fault of the Plaintiff.

Nevertheless, the wheat in its entire passage was subject to the actual control of the owner. He could take the wheat from the carrier's possession, if he saw fit, at any point on the journey, whether it had been injured or not. But he could not thereby deprive the carrier of his full freight. Having accepted the goods and begun the performance of his contract, the carrier was entitled to earn his freight; and if the owner chose to take the goods from him at any point, he could do so, but he must pay, in that case, full freight to New York.

Out of these two propositions spring the duty of the carrier in case of accident endangering the transportation on the one hand, and the duty of the owner to pay freight pro rata on the other.

When the Plaintiff's boat was sunk in the Basin at Albany, he was not absolved from his contract; it remained, as it was before, his duty to provide means of transportation, if they could be had, and, using reasonable care for the preservation of the damaged property, bring it to New York and deliver it according to the bills of lading; and if he neglected to do this (unless absolved by the act of the Defendant, or some one acting on his behalf, or unless the expense would have exceded

the whole freight from Buffalo to New York), he could not recover freight. In such a condition of things it would be absurd to inquire whether the Defendant had insured the property.

On the other hand, if the Defendant, against the will of the Plaintiff, took possession of the wheat, and deprived him of the opportunity to earn freight, then the Defendant would be liable for the freight which the Plaintiff was entitled to earn, and which he could and would have earned but for the Defendant's interference.

And intermediate these extremes, if the Defendant voluntarily accepted the wheat at Albany, in relief of the Plaintiff, and with his assent, then the Plaintiff was justly and legally entitled to recover for the service already performed, if the damage to the goods was from no fault or negligence on his part, or on the part of his agents. Although the question of negligence was in issue by the pleadings, no question on that subject appears to have been raised on the trial, and no proof was given of the extent of the damage, nor whether it could be made a counter-claim if it arose from the Plaintiff's fault. The theory upon which the case was tried probably made these questions appear immaterial.

Was there, then, an acceptance of the wheat at Albany, with the Plaintiff's assent, which relieved the latter from the duty of bringing on the goods, and made it the duty of the Defendant to pay for the service already rendered? I think the jury have, in substance, found the facts which compel an affirmative answer to that question.

The Defendant accepted a policy which authorized the agents of the insurance company, in case of damage to the goods, to intervene "in the care and saving of the property." He had himself forwarded the certificate of insurance to his consignees, L. Roberts & Co., endorsed to them. That act, per se, authorized them to deal with the insurance company and collect the insurance. Payment of the value of the property in full by the company, as for a total loss to the Defendant, operated, on well settled principles, to vest in the company the spes recuperandi,

and whatever could be saved, and so amounted to an affirmance of the possession of the wheat taken by the insurance company for its care and preservation.

It is not necessary to call this a technical abandonment under the law of insurance. The owner had not, under the policy, a right to *insist* on abandoning. But this would not prevent, and did not prevent the parties consenting to treat the case as one of total loss—the company having taken actual possession of the property saved; and if they so agreed, and the Defendant accepted such payment, he consented to actual and practical abandonment of the damaged wheat to the company, and their acts in relation thereto.

In this view it is clear that there was evidence warranting the jury in finding a voluntary acceptance of the wheat at Albany, ratified by the Defendant. The Plaintiff offered to bring the damaged wheat to New York, and if he had insisted upon doing so, I do not perceive that his claim to full freight to New York could be defeated, unless it was shown that the wheat was damaged by the way, and he failed to show himself without fault therein. But although he offered to bring the wheat to New York, yet, according to his own testimony, he yielded to the opinion of the insurance agent, and gave up the possession. I think this being in fact acted upon and affirmed by the Defendant, completed the right of the Plaintiff to have freight to Albany, unless such right could be overcome by a counterclaim, that the damage to the wheat was caused by his fault, and exceeded the pro rata freight.

For these reasons, I think the judgment may be affirmed, notwithstanding what I regard as an erroneous view of the relative rights of the parties that governed the trial.

CLERKE, GROVER, MASON, and DWIGHT, JJ., affirm in accordance with the opinion of JUDGE WOODRUFF.

Affirmed.

JOEL TIFFANY,
State Reporter.

## MAURICE LANERGAN, PLAINTIFF IN ERROR, *v.* THE PEOPLE, DEFENDANTS IN ERROR.

*Indictment—Counts—Election—Evidence—Conversation with Deceased.*

Where the indictment charging the prisoner with murder alleges, in several counts, different modes of committing the murder, the people are not put to an election upon which count they will proceed to try the prisoner, where the several counts are inserted in good faith, for the purpose of meeting a single charge.

Conversation between witness and prisoner's wife, held in a room adjoining the one where the prisoner was, although the door between the rooms be open, is inadmissible.

*Wm. F. Kintzing* for Plaintiff in Error.
*A. Oakley Hall* for Defendants in Error.

DWIGHT, J.—The Plaintiff in Error was convicted, in the General Sessions of New York city, of the murder of his wife in that city, on the 26th day of March, 1867. The conviction was of murder in the first degree.

The indictment contained three counts, alleging, severally, a killing with an axe, with a knife, and by beating and choking. After the evidence was in, the prisoner moved that the People be required to elect upon which of these counts they would go to the jury, which was refused by the Court, and the prisoner excepted.

A witness for the People, George Cram, testified that on the

---

*Evidence—Declarations—Acquiesence.* 154 *N. Y.* 375; 154 *N. Y.* 379; 172 *N. Y.* 233; *D.* 175 *N. Y.* 131; 11 *Hun,* 392; 54 *App. Div.* 624 (66 *N. Y. Supp.* 440); 34 *Super ct.* 551 39 *Super ct.* 530; 18 *St. Rep.* 1017 (2 *N. Y. Supp.* 655).

*Indictment—Counts—Election.* 65 *Hun,* 94 (47 *St. Rep.* 331; 19 *N. Y. Supp.* 865; 8 *N. Y. Crim.* 326); 2 *N. Y. Crim.* 110.

*Criminal law—Appeal—New trial—Weight of evidence.* 27 *Hun,* 287.

*Criminal law—Charge—Result of intoxication.* 13 *Abb. N. S.* 380.

day of the killing, at about one o'clock in the afternoon, he accompanied the prisoner home; that the latter was very much intoxicated; that as he entered the room where his wife was he staggered against her and "went to strike her;" that witness and the wife both remonstrated, and the prisoner staggered over into a rocking-chair, and went to sleep; that witness then advised the wife, who was not sober, to go into the adjoining room and lie down, and upon her doing so, told her he must go to his work; that the woman thereupon begged him not to go, and asked him, "Do you think he will kill me?" To which witness replied, "No; what humbug!" That, at the time of this conversation, the prisoner was in the adjoining room, the connecting door being open, the prisoner in the chair, asleep "sound and solid;" that he was asleep as soon as he struck the chair, and that witness shortly afterwards shook him in the chair, and knew he was unconscious. The prisoner's counsel objected to the evidence of the conversation between Cram and the deceased, under the circumstances above narrated; the objection was overruled, and the prisoner excepted.

After verdict the prisoner moved the Court for a new trial, on the ground that the verdict was against the law and the evidence; the Court refused to entertain the motion, deciding that it had no power to grant a new trial, the Recorder at the same time remarking: "I am quite sure that no argument of counsel would induce me to grant a new trial, either upon errors of law or of fact." And the prisoner excepted to the refusal to entertain a motion for a new trial.

One other alleged error was relied upon by the Plaintiff in Error, viz., the refusal of the Court to charge "that in order to constitute murder in the first degree, the premeditation must have existed prior to the immediate occurrence which resulted in death."

But the whole question here involved, including the construction of the act of 1862, defining degrees of murder, was disposed of in the case of Fitzgerrold *v.* The People, decided at the January Term of this Court, and will not be reconsidered here.

The evidence showed that the prisoner had always been a quiet and peaceable man, and, so far as appears, had lived pleasantly with his wife down to about the time of her death; that on St. Patrick's day—nine days before that event—the prisoner and his wife had both commenced to drink, and had continued under the influence of liquor down to the hour of the catastrophe.

There is no evidence of any motive for the commission of the crime.

The first objection raised by the Plaintiff in Error, viz., to the refusal of the Court to require the People to elect on which count of the indictment they must ask for a conviction, is untenable. As was said by Chancellor Walworth, in Kane *v.* The People (8 Wend. 203): "It is every day's practice to charge a felony in different ways in several counts, for the purpose of meeting the evidence as it may come out upon the trial;" . . . and, "if the different counts are inserted in good faith, for the purpose of meeting a single charge, the Court will not even compel the prosecutor to elect."

I am not aware that the correctness of this practice has ever since that time been questioned.

The second objection, viz., that the Court erred in admitting the testimony of the witness Cram to the conversation between himself and the prisoner's wife, I think is well taken. That conversation could be evidence only on the theory that it took place in the presence of the accused, and that not merely in his bodily presence, but in his hearing and understanding. A declaration made in the presence of one unconscious from sleep or stupor, cannot be evidence against him; and that seems to have been the condition of the prisoner here. The learned Judge below thought it was for the jury to say whether he was wholly unconscious or not; but the evidence on that point was uncontradicted, and to my mind, seems positive.

The witness says that the prisoner was very much intoxicated; that immediately upon coming into the room he staggered over into a rocking-chair and went to sleep; that he appeared to be asleep sound, solid; that as soon as he struck the chair

he was gone; that about the same time witness shook him in the chair, and was satisfied he was unconscious.

It is true the witness testifies that shortly after the conversation he told the prisoner to go to bed, and that he did get to bed, with the assistance of the witness; but I have no doubt it was then that he shook him in his chair, and found such means necessary to rouse him sufficiently to be got to bed.

But, aside from this condition of the prisoner, and whatever the degree of his stupor, the conversation was not even in his bodily presence. The fact, apparently overlooked by the learned Judge below, is, that the prisoner was in one room, and the interlocutors —the witness and the deceased—in an adjoining room. Cram had induced the deceased to go into his room, adjoining that in which the prisoner and his wife lived, and lie down; he had gone in with her, and it was when he was about to leave her that the conversation took place. It is true he testified that the door between the rooms were open, but there is no evidence of the position of the several parties relative to the door, nor of their distance from it, nor whether the tone of voice used was such as could have been heard from one room to the other.

Since, therefore, this conversation was not in any sense in the presence of the accused, it was clearly inadmissible, and unless it appears that it cannot, in any degree, have operated to the prejudice of the prisoner, its admission is good ground for a new trial. Upon this point it seems to me there can be no question. The evidence of the prisoner's guilt was wholly circumstantial. Both the fact of killing, and the design to effect death, were required to be inferred from the circumstances, mainly, of opportunity and of the conduct of the prisoner before and after the event.

Prominent among these was the fact of some threats uttered by the prisoner on the same day of the killing, though not in the presence of the deceased; and the evidence of the conversation with Cram certainly tended to show that the prisoner had previously made similar threats to the deceased herself, or had

in some other way impressed her with a fear of fatal violence at his hands.

Her language to Cram clearly indicated an apprehension in her mind that the prisoner entertained a murderous purpose towards her, and it is not only impossible to say that this proof cannot have influenced the minds of the jury, to the prejudice of the accused, but it is difficult to see how it can have failed to do so. In my opinion the admission of this testimony was an error fatal to the trial.

The remaining objection of the Plaintiff in Error which I shall consider is, that the Recorder erred in refusing to entertain a motion for a new trial. In the opinion below it is said, "the Recorder denied this motion on its merits." But surely it is not possible to decide such a motion on its merits without entertaining it; and in this case the Recorder distinctly refused to entertain the motion, on the ground that he had no power to grant it, although he added, that if he had the power he would not exercise it.

There can be no doubt that the Recorder was wrong in his opinion on the question of the power of his Court to grant a new trial.

The act of 1859 (Laws of 1859, chap. 339, § 4) provides: "The Courts of Sessions of the several counties in this State shall have power to grant new trials upon the merits, or for irregularity, or on the ground of newly discovered evidence, in all cases tried before them." It is difficult to see how this provision could have been understood not to include the "Court of General Sessions of the Peace in and for the City and County of New York." And this Court in the case of Lowenburg *v.* The People (27 N. Y. 336), held that substantially the same language, in another act, did include that Court.

The question in that case arose under chap. 208 of the laws of the same year (Laws of 1859, chap. 208, § 1), which provides: "It shall be lawful for the Court of Sessions of any county in this State to continue its sittings at any term thereof so long as it may be necessary," &c.; and the opinion in that case, which upon this point, seems to have been concurred in by the

whole Court, holds the following language: "The Court of General Sessions of the Peace in and for the City and County of New York is but a Court of Sessions of the County of New York, and is designated in the act of 1859, by the words, 'the Court of Sessions of any county of this State.' "

There can be no question but that the designation in chap. 339 is equally inclusive with that in chap. 208, and, consequently, no question but that the Court of General Sessions of New York has the power to grant a new trial on the merits. Such being the case, I cannot avoid the conclusion that a substantial right was denied the prisoner in this case, viz., the right to have his motion for a new trial heard by the Court which tried him.

I cannot think that this motion was decided upon its merits. The remark of the Recorder about not being induced to grant the motion seems to have been a hasty declaration, made without hearing counsel, and coupled in the same breath with the decisive announcement that he had no power to entertain the motion. Nor am I prepared to say, as is said in the opinion below, that if the recorder had granted a new trial, it would have been an error. I do not think an Appellate Court can decide what effect a review of the case might have had upon the Judge who tried it, and who heard and saw all the witnesses on the stand.

If the prisoner had a right to move for a new trial, he had a right to have that motion heard and considered. That right was denied him, and, in my opinion, that denial was error.

If the views which I have expressed upon the second and third objections of the Plaintiff in Error, as enumerated above, are correct, it follows that the judgment of the General Term of the Supreme Court, and that of the General Sessions, should be reversed, and a new trial granted.

Reversed—on the ground of error in admitting evidence, WOODRUFF, GROVER, MILLER, JJ.; and on both grounds, DWIGHT and BACON, JJ.

JOEL TIFFANY,
State Reporter.

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS AND APPELLANTS, *v.* HUGH O'BRIEN AND OTHERS, DEFENDANTS AND RESPONDENTS.

*Local Laws—Tax Levy of* 1867—*Title.*

Section 8 of chap. 586, of Laws of 1867, is local in its character, and comes within the prohibition of art. 3d, section 16, of the Constitution.

Section 8 of the above Act, so far as it relates to the term of office of Councilmen in the city of New York, is local in its character.

*Wm. M. Tweed, Jr., N. J. Waterbury,* and *J. K. Porter* for Appellants.

*Waldo Hutchins* and *Aaron J. Vanderpoel* for Respondents.

GROVER, J.—From the facts found by the Judge upon trial, the Respondents are respectively entitled to hold the office of Councilmen of the city of New York, in case sect. eight (8) of chapter five hundred and eighty-six (586) of Laws of 1867. entitled, "An Act to enable the Board of Supervisors of the County of New York to raise money by tax for the use of the Corporation of the City of New York, and in relation to the expenditure thereof; and to provide for the auditing and pay-

---

*Local statutes—Title.* 42 *N. Y.* 188; 43 *N. Y.* 20; 49 *N. Y.* 135; 50 *N. Y.* 566; 58 *N. Y.* 332; 70 *N. Y.* 350; 86 *N. Y.* 7; 126 *N. Y.* 464 (37 *St. Rep.* 836); 144 *N. Y.* 408 (63 *St. Rep.* 649); 7 *Hun,* 240; 8 *Hun,* 491; 9 *Hun,* 188; 60 *Hun,* 36 (38 *St. Rep.* 607; 14 *N. Y. Supp.* 421); 77 *App. Div.* 32 (79 *N. Y. Supp.* 239); 88 *App. Div.* 165 (84 *N. Y. Supp.* 602); 5 *Lans.* 123; 3 *Abb. N. C.* 317, 422; 44 *How. Pr.* 377; 45 *How. Pr.* 156; 47 *How. Pr.* 521; 48 *How. Pr.* 459; 51 *How. Pr.* 138; 10 *Misc.* 60 (63 *St. Rep.* 164; 30 *N. Y. Supp.* 857); 38 *St. Rep.* 103 (15 *N. Y. Supp.* 649); 39 *St. Rep.* 587 (15 *N. Y. Supp.* 689).

*Voters—Election—Official notice.* 9 *Misc.* 248 (6 *St. Rep.* 579; 30 *N. Y. Supp.* 266).

ment of unsettled claims against said city, and in relation to actions at law against said corporation," so far as it relates to the term of office, and the time of electing Councilmen in future, is constitutional, and therefore valid; and that if that section is in conflict with the constitution, and therefore void, it is equally clear that the Respondents are not entitled to the office, but that the Appellants respectively are so entitled. It is claimed by the Appellants' counsel that section 8 of the Act is in conflict with and a violation of art. 3, sect. 16, of the constitution of the State, and also with article 10, sect. 2. Section 16, art. 3, of the constitution provides that "No private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title."

The first inquiry obviously is, whether section 8 of the act above referred to, so far as it relates to the term of office of Councilmen in the city of New York, and the time, &c., of their election, is local, in the sense of the constitution.

It is clear that it relates only to the officers of the municipal corporation of New York, and has no force outside of the territory embraced in the corporation, nor any possible effect upon property not within the corporate limits, or upon persons not for the time being within such limits.

It would seem to follow, necessarily, that the act in question is local, as contradistinguished from general. The former is entirely confined in its operations to the property and persons of a specific locality. The latter embraces either persons or property of the people of the State in general, or of some class of persons or species of property, not limiting the operations of the law to any particular locality less than the whole.

This view is sustained by the judgment of this Court in The People *v.* Hills (352 N. Y. 449). In that case it was held that amending the charter of the city of Rochester was local, within the meaning of the constitution. The section (8) in question, so far as it relates to the office of Councilmen, amends the charter of New York City.

There is no distinction in respect to an act modifying the charter of New York from one modifying that of Rochester, except in respect to the population of the cities—that of the former being vastly larger than that of the latter. Notwithstanding this, the act, in either case, affects only a particular locality. The question, whether local or general, cannot depend upon the relative numbers in any particular locality.

It cannot be true that an act relating to the charter of Utica is local, while one relating to that of Buffalo is not, although the latter has four times the population of the former; nor that relating to Buffalo local, and that to New York not, because the latter has much the greater population.

The framers of the constitution had no such design, or they would have prescribed some standard, based upon population, by which the question should be determined. Not having done so, they must be presumed to have used the term local in the sense in which it is generally understood.

In this sense any law limited to any particular locality is local, irrespective of the population of such locality, whether great or small. The People *v.* McCann (16 N. Y. 60), and Williams *v.* The People (24 id. 405), are not in conflict with this view. In the former the act was held general because it not only regulated, in some respects, the administration of justice in the county of New York, but also in this Court; and in Williams *v.* The People it was held general because it provided for the confinement of convicts in the prisons of the State, outside of the city of New York. This was one of the reasons assigned for the judgment. In neither were the acts limited in their operation to the city, or any other specified locality. The section in question being local, it remains to inquire whether its subject is expressed in the title. A perusal of the title of the act (supra) will clearly show that it is not. No one, from reading the title, would have the slighest idea that the term of the office of the Councilmen of the city of

New York was in any way affected. The section must, therefore, be adjudged void upon this ground.

This renders it unnecessary to inquire whether it is in conflict with section 2, art. 10, of the constitution.

The judgment of the Court below, at General and Special Term, must be reversed, and judgment entered removing the Respondents, except Hugh O'Brien, from the office of Councilmen of the city of New York.

It is insisted that the Relators were not respectively duly elected to the office, for the reason that the notice of such election required by law was not given.

This objection is fully answered by the rule adopted by this Court in The People *v.* Cowles (3 Kernan, 350), and in The People *v.* Cook.

The judgment must further declare that the Relators are entitled to the office, with costs of this Court, and of the Courts below. As to Hugh O'Brien, the judgment must be affirmed, with costs.

Affirmed as to Hugh O'Brien.

Reversed as to all others.

JOEL TIFFANY,
State Reporter.

## WILLIAM BROWN, APPELLANT, *v.* JACOB WEBER, JR., RESPONDENT.

*Statute of Frauds—Principal and Surety—Contract—Entire performance.*

Under the provision of the Statute of Frauds, that every special promise to answer for the debt, default, or miscarriage of another person must be in writing, and be signed by the party to be charged thereby, the principal inquiry raised is, whether the party sought to be charged is the *principal* debtor; or whether he is liable only in case of the default of a third party —that is, whether he undertook as principal absolutely, or as surety only.

THE Defendant contracted, in writing, with one Horton, to build a saw-mill for him upon the Defendant's land—Horton furnishing the materials therefor, according to the specifications of the contract—and to pay him therefor, as in like manner specified. Horton framed and raised the building, and then contracted in writing, with the Plaintiff to complete the same, Horton furnish a portion of the materials therefor.

In addition to the above facts, the referee further found that the Plaintiff commenced work upon the mill under the contract between him and Horton. That after he had so commenced the Plaintiff became fearful that Horton was not re-

---

*Statute of frauds—Promise to pay another's debt.* 42 *N. Y.* 245; 59 *N. Y.* 252; 60 *N. Y.* 240; 73 *N. Y.* 411; 108 *N. Y.* 226 (13 *St. Rep.* 495; 28 *Week. Dig.* 260); 14 *Hun,* 237; 72 *Hun,* 494 (54 *St. Rep.* 858; 25 *N. Y. Supp.* 195); 72 *Hun,* 511 (54 *St. Rep.* 769; 25 *N. Y. Supp.* 216); *D.* 90 *Hun,* 601 (70 *St. Rep.* 569; 35 *N. Y. Supp.* 994); 18 *App. Div.* 625 (45 *N. Y. Supp.* 432); 1 *Misc.* 206 (49 *St. Rep.* 82; 20 *N. Y. Supp.* 879); 2 *Misc.* 419 (51 *St. Rep.* 426; 21 *N. Y. Supp.* 947); 9 *Misc.* 409 (61 *St. Rep.* 696; 30 *N. Y. Supp.* 196); 23 *Misc.* 106 (50 *N. Y. Supp.* 714); 29 *Misc.* 336 (60 *N. Y. Supp.* 511); 43 *Misc.* 639 (88 *N. Y. Supp.* 397); 65 *Barb.* 379; 8 *Abb. N. S.* 116; 14 *Abb. N. S.* 300; 2 *T. & C.* 418; 13 *Abb. N. C.* 349; 48 *Super. Ct.* 191; 49 *Super Ct.* 424; 4 *Daly,* 373; 7 *Daly,* 350; 10 *Daly,* 386; 1 *City Ct.* 411; 20 *N. Y. Supp.* 879; 45 *N. Y. Supp.* 432.

*Contract—Entire performance.* 50 *Hun,* 255 (19 *St. Rep.* 220; 2 *N. Y. Supp.* 869).

sponsible for the performance of his contract on his part with Plaintiff, which he communicated to the Defendant. That the Defendant, to induce the Plaintiff to go on and finish the mill according to the contract, did promise the Plaintiff that, if he would go on and finish the mill, according to the contract, he would see that the Plaintiff did not lose anything by it; also, that Defendant told the Plaintiff that he would see that Plaintiff got his pay, if Plaintiff finished the mill according to contract. That by the word "contract" the Defendant meant the contract between him and Horton.

The referee further found that the Plaintiff went on and finished the mill, according to the contract between Defendant and Horton, with certain exceptions, particularly specified. He further found that, during the progress of the work, the Defendant was often at the mill, and expressed his approbation of the manner in which the work was being done. That after the Plaintiff quit work the Defendant used the mill for sawing; but he also found that this was under an agreement between Horton, Plaintiff, and Defendant, that this use should not be regarded as an acceptance of the mill. The referee also found that Horton agreed to pay Plaintiff two hundred dollars for performing the job, in a note of the Defendant, which he (Horton) was to procure of the Defendant for the Plaintiff.

The referee found that Defendant had boarded Plaintiff and his hands while at work on the job, at Plaintiff's request, and furnished a small amount of team work and cash for the Plaintiff.

The referee held, as a legal conclusion, that the promise of Defendant to the Plaintiff was within the Statute of Frauds, and that the Defendant was not liable to the Plaintiff thereon, and gave judgment in favor of the Defendant for the amount of his account against the Plaintiff, which was affirmed, upon appeal, by the Supreme Court; and the Plaintiff appealed therefrom to this Court.

*E. Countryman* for Appellant.
*J. E. Dewey* for Respondent.

GROVER, J.—Leaving the question arising upon the Statute of Frauds entirely out of view, I am unable to see how the Plaintiff can recover of the Defendant for the work done by the former in building the sawmill. The promise by the Defendant to the Plaintiff was upon the performance by the latter of the contract of Horton to build the mill. The referee, so far from finding performance of this contract by the Plaintiff, has expressly found that he did not perform it, and has also found the particulars in which he failed so to do. It is impossible to say that all these specified particulars constitute no essential part of the contract, and may be regarded as so trifling that the law will disregard them. The referee has not so found, neither can this Court. Had the judgment of the referee been placed upon this ground, it could not have been disturbed. Performance by the Plaintiff was plainly a condition precedent to his right to recover, and where this is the case, it is clear that no recovery can be had without performance in all essentials, or waiver of such performance by the other party. Neither the referee nor Court below proceeded upon this ground, but decided the case against the Plaintiff upon the ground that the Defendant's promise was within the Statute of Frauds, and therefore void.

A brief examination of this question will therefore be proper.

The question arises upon the second clause of section two of the act (N. Y. Statutes at Large, Vol. 2, 140). That clause declares "Every special promise to answer for the debt, default, or miscarriage of another person," void, unless such agreement, or some note or memomandum thereof, be in writing, and subscribed by the party to be charged therewith. The language of this clause is perfectly plain, and to one inexperienced it would not appear that any great number of difficult cases could arise depending upon its construction; but an examination of the cases will show that there have been but few more prolific sources of litigation. The language shows that the test to be applied to every case is, whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of a

third person; in other words, whether he is the debtor, or whether his relation to the creditor is that of surety to him for the performance, by some other person, of the obligation of the latter to the creditor. In the former case, the promise is not within the statute, because the party promising is not undertaking for the performance by another of some duty owing by the *other,* but for the performance of his own obligation; but in the latter case, it is within the statute, because the liability is contingent upon whether another performs his obligation, for whose performance the party sought to be charged has undertaken. There has never been any dispute as to the above principles; but the difficulty has been in determining to which class the cases that have been adjudged belonged.

The principal cases were very elaborately reviewed and classified in Mallory v. Gillett (21 N. Y. 412).

From these cases it appears that the Courts have endeavored to establish certain rules, by the application of which the case in judgment could be determined; but this has been attended with much embarrassment, arising from the almost infinite variety of cases that have arisen. One test was the inquiry whether the promise was original or collateral. This would be perfect if the term original is understood, in all cases, as applicable only to an absolute undertaking by the party promising to discharge an obligation of his own, not at all dependent upon performance or non-performance of anything by another.

The party is then himself the debtor, and must discharge the obligation, and it matters not whether some other is liable for the same thing or not. The party promising is not discharged, although another may pay or perform, unless the other does it as his surety, or by his procurement. But this test is liable to mislead, as is shown in the case of Mallory *v.* Gillett (supra), if the term original is understood in the sense of new.

Another test, relied upon in many case, is, whether the consideration was new, not arising out of the existing obligation, and received by the party making the promise. When this

was the case, it was held that the case was not within the statute, and these facts are cited as the reasons why it is not. In most cases these facts will show whether the party promising contracted an independent obligation of his own, or whether his position to the creditor was that of a surety.

The former case is not within the statute; the latter is. As an illustration, suppose A delivers property to B, in consideration of his promise to become surety to him for the payment of a debt owing to him by C. The case is within the statute, because B's obligation, although upon a consideration received by him, is that of surety only that C shall perform.

Again: suppose that B, in consideration that A will discharge C of a debt owing to A, promises A that he will thereafter pay the whole or any part of such debt, the case is not within the statute, for the reason that B has contracted an independent debt of his own, and is in no sense surety to A for the performance of anything by C, although he personally received no consideration for his promise.

It will thus be seen that the receipt or non-receipt of the consideration by the party promising does not determine, in every case, whether it is within the statute or not, but that the inquiry still remains, whether he entered into an independent obligation of his own, or whether his responsibility was contingent upon the act of another. In the present case the argument of the Plaintiff's counsel is, and the dissenting opinion proceeds upon the ground, that, because the mill was built upon the land of the Defendant, and became his property when built, he received the consideration for the promise, and that therefore it is not within the statute. We have already seen that this does not determine the question.

It must be further ascertained whether the Defendant made a contract with the Plaintiff to complete the mill for him, and undertook to pay him therefor, or whether his promise really was that he would become surety that Horton should pay the Plaintiff for the work.

The referee has determined that it was the latter, and this

consideration accords with all the facts of the case. It is true that it was competent for the Defendant, although he had made the contract with Horton, who had contracted with the Plaintiff to fulfiil the contract, except certain materials to be provided by Horton, to make an independent contract with the Plaintiff for doing the same job, and to pay him therefor, and such contract would not come within the statute; but the difficulty with the Plaintiff's case is, that the referee has found no such contract; nor would the evidence warrant such a finding. It was said, in the able argument of the Plaintiff's counsel, that the Defendant's promise could not apply to the contract between the Plaintiff and Horton, for the reason that, by that contract, Horton was to find a portion of the materials, and the referee has found that the Defendant referred to and meant the contract between him and Horton, and that therefore the Plaintiff undertook the performance of a different contract from that made between him and Horton.

The answer to this position is, that Horton, as the work progressed, did find materials for the job, to some extent. This shows that the Plaintiff was at work upon the contract made by him with Horton, and not upon any new independent contract made by him with the Defendant.

The same thing appears from the fact that nothing whatever was said between the Plaintiff and Defendant as to the price to be paid by the Defendant to the Plaintiff.

This could not be determined by reference to the Defendant's contract with Horton, for the reason that that did not show what should be allowed to Horton for what he had done on the job. The counsel claims that the referee erred in giving judgment in favor of the Defendant for the board of Plaintiff and his hands, &c. These items were shown to constitute a demand against the Plaintiff, for which he was legally liable to the Defendant, and the Plaintiff failed to show any legal liability of the Defendant to him.

The referee was therefore correct in his conclusion.

The judgment of the referee was correct, upon the ground that Plaintiff failed to show an entire performance of the con-

tract, and also that the promise of the Defendant was within the Statute of Frauds; and the judgment of the Supreme Court, affirming the same, must be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

---

NOAH WORRALL, APPELLANT AND RESPONDENT, *v.* DAVID MUNN, RESPONDENT AND APPELLANT. (Cross Appeals).

*Contract—Specific Performance—Waste—Measure of Damages.*

When a Court of Equity decrees the specific performance of a contract for the conveyance of land, it will proceed to give full and complete relief by awarding to the Plaintiff the damages which he has sustained by being kept out of possession, and also the damages by waste committed by the Defendant.

And such damages will be allowed down to the time of the final assessment, although the litigation may have been prolonged for many years after the interlocutory decree, which declares the Plaintiff's title to specific performance. Damages for waste should be ascertained by the value of the wood, timber, and other property carried away by the Defendant, and interest thereon should be allowed from the time when the Plaintiff is let into possession of the premises, and down to the final assessment.

The general rule for the allowance of damages to the Plaintiff for being kept out of possession is to treat the vendor as trustee of the purchaser in respect of the land, and accountable for the rents and profits, or value of the use and occupation; and the purchaser, if the purchase-money has not been paid, will be charged with interest. But this rule is not invariable, and its application will be varied by special circumstances.

When, as in the present case, the value of the land consisted chiefly in valuable clay pits thereon, to be made productive by consuming the clay in brick-making, and the land was of trifling value for any other use, the

---

*Contract—Breach—Measure of damages.* 103 *N. Y.* 423 (3 *St. Rep.* 659; 25 *Week. Dig.* 98); 162 *N. Y.* 332 (30 *Civ. Proc.* 366); *D.* 162 *N. Y.* 335 (60 *Civ. Proc.* 370); 38 *Misc.* 258 (77 *N. Y. Supp.* 588).

*Answer—Set-off in equity—Time of Accruing.* 139 *N. Y.* 120 (54 *St. Rep.* 644).

*Equity—Scope of relief—Foreclosure.* 105 *N. Y.* 664 (8 *St. Rep.* 63; 26 *Week. Dig.* 504; 1 *Silvr. Ct. App.* 451); 158 *N. Y.* 593.

purchaser, having paid the purchase-money, should be allowed an annual sum as damages equal to interest on the purchase-money, and also interest on each annual sum down to the time of the assessment.

THE Plaintiff, in 1844, filed his bill in Chancery to compel the specific performance of an agreement for the sale and conveyance to him of certain land in the county of Rockland. The agreement was made by one David M. Prall, who, after the making of the agreement, and prior to the filing of the bill, had conveyed the land to the Defendant Munn—the latter having knowledge of the prior agreement.

On the 31st of March, 1846, a decree was made in the action requiring the Defendant to convey to the Plaintiff, requiring the Plaintiff to pay the purchase price to Prall, with interest from the date of the agreement, and further directing that it be referred to a master "to ascertain and compute the *amount of damages which the Plaintiff has sustained by reason of his having been kept out of possession of said premises, and by reason of the waste commited by the said Defendant, David Munn.*"

This decree was appealed from by the Defendant, and was affirmed by this Court in 1851.

The reference to ascertain damages then proceeded before a referee (substituted for a master), and in August, 1860, he reported the amount of the damages sustained by the Plaintiff, by reason of having been kept out of possession from 1843 to 1859 inclusive, $6,839.76, and by reason of waste committed, viz., in the years 1844, 1845, 1846, and 1847, $10,786.77.

The former amount being ascertained by finding the sum for which the premises could have been rented, with the privilege of digging clay and sand and manufacturing brick thereon, and allowing to the Plaintiff the *interest* on *those rents* to the date of the report, as damages for the detention, on the ground that, as the privilege of so using the materials for brick-making would, if exercised, have consumed them, and as the detention which prevented such use had at the same time preserved to the Plaintiff the same materials, to be in the future made productive, the injury to the Plaintiff, or effect of the de-

tention, was a mere inability to realize the productive value of the premises (by consuming them) at so early a day as would have been practicable if the contract of sale had been performed according to its terms.

On the coming in of the report it was held by the Supreme Court, at Special Term, that the damages for the detention of the premises were not computed upon the proper rule, and those dameges were directed to be computed by allowing to the Plaintiff—not interest on what he might have realized by letting the premises for brick-making, and so by consuming the materials, but interest on the purchase-money itself, the interest upon which had presumptively been a total loss to the purchaser, so long as he was deprived of the use of that which the agreement of sale treated as of equal value, viz., the land sold.

From the judgment entered in conformity with that direction, the Defendant appealed to the General Term, and there, on the 22d May, 1863, the judgment was reversed upon two grounds:

First, that the rule adopted for ascertaining the Plaintiff's damages for being deprived of the possession was erroneous in this, that the only damages allowable were the fair value of the premises for use and occupation for purposes not involving the destruction or consumption of the premises themselves, or of that wherein their value for brick-making consisted; and

Second, that the Plaintiff was not, under the decree, entitled to damages, either for detention or for waste, after the date of the decree of 31st March, 1846, especially as the judgment was joint against the Defendant Prall as well as Munn; and it appeared that Prall, immediately after that decree, tendered a deed, as thereby required, and he ought not, after that time, to be held liable for Munn's separate individual acts.

A further reference was ordered to compute the damages on the basis of the last decision, and such reference being had, the referee reported, April 10, 1866, as damages for the loss of the possession of the premises for two years prior to the date of the decree (1846), fifty dollars per year, that being the

value of the use of the premises "for agricultural purposes" ..... .....$100 00

Interest thereon for twenty years..... 140 00

$240 00

Damages for waste committed by the Deefndant Munn in 1844 and 1845 (interest being allowed on the value of the materials and timber carried off the premises)..... $5,550 13

Making in all.....$5,790 13

and for this amount judgment for the Plaintiff was entered, and affirmed in the Supreme Court, and both the Plaintiff and the Defendant Munn appealed to this Court.

Meantime, Prall having died, the Plaintiff and the representatives of Prall made such an arrangement of the interest of the latter in the controversy that it is understood to be conceded that the questions raised on this appeal only affect the rights of the Plaintiff and Munn, as between themselves, and that Prall and his representatives are no longer interested therein.

The Plaintiff insists that the rule of damages for having been kept out of possession is erroneous and inequitable, he having offered to prove that the premises were bought for the purpose of using them in brick-making, and that such purpose and intention were known at the time to the Defendant; and also that the damages for such detention, and for waste committed, should have been ascertained and allowed down to the date of the report, or to the actual surrender of the possession by Munn.

The Defendant, under his appeal, insists that it was erroneous to allow interest on the annual value of the premises, or on the value of the property taken by Munn from the premises in the commission of waste, and that the Plaintiff was not entitled to recover any damages arising after the commencement of the action.

*William Fullerton* for the Plaintiff.

*C. Frost* for the Defendant.

WOODRUFF, J.—It is not claimed on this appeal that when a Court of Equity sustains a bill filed to compel the specific performance of a contract for the conveyance of lands, and decrees such conveyance, it is not within the proper exercise of its jurisdiction, and according to its settled modern practice, to give full and complete relief by awarding to the Plaintiff not only the conveyance to which he is entitled, but also the damages which the Defendant has caused by his culpable refusal and delay in the performance of his contract. These may be ascertained by the Court in any mode which its discretion approves.

The Court might proceed directly with the inquiry, or refer it to a master, or order an issue quantum damnificatus, as seemed most suitable (Story's Eq. Jur., §§ 793-799), and will even prohibit the Plaintiff from proceeding in another Court to collect his damages (Prothero *v.* Phelps, 25 Law J., Ch. 105; Reynolds *v.* Nelson, 6 Mad. 290; Frank *v.* Basnett, 2 Mylne & Keen, 618).

The questions raised on this appeal are:

1st. What is the rule of damages for the delay, the vendor being in the possession of the land?

2d. Is the vendor liable for deterioration arising from wilful waste committed by himself?

3d. To what time shall the damages be allowed?

4th. Shall the vendor be charged with interest on the damages as they arise until final judgment?

First, what is the rule of damages for the delay in the conveyance of the premises to the Plaintiff, which damages the decree in this case awards to him, or, in the language of such decree, "the damages sustained by reason of being kept out of the possession?"

The general rule on this subject, as laid down by the elementary writers, and in the adjudged cases, is, that the Court of Equity will, so far as possible, place the parties in the same situation in which they would have been if the contract had been performed according to its terms; and to that end the

vendor will be regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for the rents and profits; and the purchaser will be treated as trustee of the purchase-money, if not paid, and will be charged with interest thereon (2 Story's Eq. Jur., § 789; Fry on Sp. Performance, § 889, and cases cited). And where the vendor is himself in the actual occupation of the premises, he is charged with the value of the use and occupation (Robertson *v.* Skelton, 12 Beav. 260; Dyer *v.* Hargrave, 10 Ves. 506).

But while this is the general rule, it is not inflexible. A Court of Equity moulds its relief and gives redress according to the circumstances of each case.

Where the purchaser has always been ready to pay, and has kept his money unappropriated, he is excused from the payment of interest (De Visme *v.* De Visme, 1 McN. & Gordon, 352; Regent's Canal Co. *v.* Ware, 23 Beav. 575).

Where part of the purchase-money had been paid, the Court sought to effect an equitable result by charging the vendor, not only with the rents, but with interest, from year to year, upon a corresponding portion of such rents (Burton *v.* Todd, 1 Swan. 255).

So where the subject of the purchase was a mill, and the delay of performance arose from the failure of the vendor to show good title, he was charged with the expenses of repairs and of keeping up the mill and machinery until the purchaser could properly be required to take possession (Corrodus *v.* Sharp, 20 Beav. 56).

Some other qualifications apt to this case will be presently noticed. It is, however clear, that in the endeavor to do equity betwen the parties, regard must be had to the special circumstances, wherever there are any peculiarities which render the rigid application of any general rule unsatisfactory.

It is clear, in my judgment, that it is the endeavor to apply the general rule to the present case, without any qualification, and to treat the rule of damages as if it had been a question at law, and on an assessment in trespass for mesne profits, that has involved the question in apparent doubt, and wrought to the Plaintiff apparent hardship.

Thus: he has purchased and paid—as required by the decree to pay—$4,500 for the land, and while the use of the money has been presumptively worth $315 per annum, he has been kept out of possession for more than twenty years, and has been permitted to recover, as damages for the loss of possession, $50 a year for two years, and interest thereon—less, in all, than one year's interest on the purchase-money.

It would be a matter of regret, if the rules applicable to the subject are such that a Court of Equity cannot render more equal justice.

The present case is peculiar in two respects, viz.: First, the purchase-money, with the interest thereon, was payable, and was properly decreed to be paid, to the Defendant Prall, the original owner and vendor of the premises, who acquiesced in the decree, and executed a deed, in obedience to its requirements, while the possession was held by the Defendant Munn; and second, the principal value of the land consisted in the deposits of clay, adapted, by the consumption thereof, to the manufacture of brick upon the premises.

The inapplicability of the general rule above stated to land of this description may be rendered quite apparent by an illustration closely analogous to the present. E. g., suppose a sale of land of no value for ordinary use, because incapable of cultivation, and entirely unsuited to pasture, and yet, by reason of a bed of valuable ore, of very large value, and for that sole reason sold at a large price.

On a decree for specific performance, shall the purchaser be charged with interest on the purchase-money for the period during which he is kept out of possession, and the vendor pay nothing, because the rents and profits are nothing, for depriving the purchaser of the oportunity of working the mine or ore-bed during the period of delay? Or, if the purchase-money has been paid, shall the vendor, who has enjoyed the use of the purchase-money, have the advantage of his own wrong, and make no compensation to the purchaser for his loss of opportunity? The answer must be: Not so, unless the rules of equity are so imperfect that such injustice cannot be prevented.

Does it follow that the damages are to be ascertained by inquiring what profits the purchaser could have made by working the mine? That question is, in substance, this—Was the referee right, on the first reference in the present case, in inquiring how much the Plaintiff might have received for the privilege of making brick on the land, thereby exhausting the bed of clay, which, in fact, now remains to him to be worked, presumptively with equal benefit, and therupon allowing to the Plaintiff interest on such possible receipts, from year to year, as damages for the delay?

This mode of estimating his damages proceeded upon the ground, not that the Plaintiff lost the clay-beds (which constituted the chief value of the land), but that he lost the opportunity of converting them into money so soon as he might perhaps have done if he had obtained the possession when he was entitled thereto.

I find no warrant for any such speculative rule or measure of damages; no case is cited to us, and, I think, it may be safely averred that no case can be found in which such a rule was adopted.

No analogy can be found in any rule of assessment of damages at law.

The rule there is the value of the use, not the profits of the consumption of the property detained, when, in fact, the entire property is restored to the Plaintiff's possession.

True, witnesses may testify that the premises would have supplied a given number of brick kilns; that they would have annually have made a stated number of brick, and that the privilege of making so many brick would be worth a sum mentioned; and may add an opinion, that persons could have been found to pay an annual sum named for the privilege. But it is quite obvious that such evidence is, in its very nature, conjectural, and lacks that element of certainty which ought to determine the extent of liability.

Neither does any rule suggested by cases in equity, or by writers of authority, authorize this mode of measuring damages. Invariably, so far as I have been able to discover, when *loss* of the *use* of the land itself has been made the criterion

or *test* of the Plaintiff's damages, it is the value of the use, and not the profits of its exhaustion of whatever it contains of value, that furnishes the rule.

But on the other hand (as in fact already suggested), is the value of the use the only rule or measure of damages? In the case above supposed, and in the case now before us, the value of the use of the land in any mode not involving its consumption, is nothing, or at most very trifling. If it were a ledge of sterile rocks, of no value but for its mine, and yet of very large value for the privilege of exhausting the mine of all that made it valuable, such use, apart from the privilege of mining, would be literally nothing.

If, then, the Plaintiff is not entitled to recover damages computed upon the basis of profits anticipated from consuming the clay and sand upon the premises, or letting to others that privilege, and, on the other hand, the use of the land for any other purpose would furnish no real indemnity, is there any recognized equitable rule or measure by which injustice can be prevented?

To this I answer: although he may not be compensated for the profits or gains which possibly he might have realized by converting the land or its deposits into money at an earlier day, he may be protected against actual loss. If this be done, the result ought to be satisfactory; and more than this would be to impose a penalty upon the Defendant (who has certainly not realized profits by the detention), which a Court of Equity will not do beyond what indemnity to the Plaintiff requires.

The subject of the sale was peculiar. It has little value for any annual use that does not involve the consumption of that which gives it value. The Plaintiff offered to prove that he purchased for the express purpose of devoting "it to the making of brick, and so converting its contents into money."

Now, suppose the Plaintiff, although he contracted to pay therefor a large sum, had, in fact, paid no part of the purchase-money, and he was now to be put in possession and permitted to carry into effect the purpose for which he bought the property.

He would be completely indemnified against loss by relieving him from the payment of interest.

True, he would fail to realize at so early a day as he anticipated the profits of his bargain, but he has now that chance of profits, and meantime he has had the use of the purchase-money.

In short, the general rule which allows to the vendor the interest, and to the purchaser the rents and profits, failing to apply, because, from the character of the land, there are no rents and profits, or an amount grossly inadequate to a just indemnity, the purchaser is equitably entitled to be indemnified, if any definite and certain mode can be found by which to ascertain it.

Relief from the payment of the interest is in such case palpably the most obvious, as it is the most equitable mode of doing so,—for otherwise the vendor is permitted to profit by his own wrong, and the purchaser compelled to submit to a certain loss.

This is no novel suggestion, nor a new mode of doing equity in such case, but is one of the recognized exceptions to the general rule on the subject. Thus, in Esdaile *v.* Stephenson (1 Sim. & Stu. 122), it is said by Sir John Leach, Vice-Chancellor: "If the interest is much more than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, then, to give effect to the general rule, would be to enable the vendor to profit by his own wrong; and the Court, therefore, gives the vendor no interest, but leaves *him* in possession of the interim rents and profits."

This principle was acted upon by him in Monk *v.* Huskisson (reported in a note, 4 Russ. 121). And in Jones *v.* Mudd (4 Russ. 118) the question came distinctly before the Lord Chancellor, and he affirmed the views of the Vice-Chancellor in the case above referred to. To the like effect is Paton *v.* Rogers (6 Mad. 256), before the same Vice-Chancellor.

And in Burton *v.* Todd, above cited, Lord Eldon, in a case in which the ordinary rents and profits could alone be regarded as in the contemplation of the purchaser as an inducement to

the purchase, showed the inapplicability of the general rule, where the purchaser had paid a portion of the purchase-money, and provided indemnity to him by charging the vendor with the interest upon a corresponding portion of the rents and profits.

The principle of these cases furnishes a clear and precise guide to the true equity between the present parties. If the money was in the hands of the Plaintiff, to be paid over to the Defendant, he would not be chargeable with interest. The use of the money during the time that he has been kept out of possession by the Defendant would have been enjoyed by him, and the Defendant would have left to *him* the rents and profits, or the use and occupation, while thus wrongfully retaining possession. But it is one of the peculiarities of this case that the purchase-money and interest were due to the Defendant Prall, and have been paid while the Defendant Munn was in possession; and during the period of the litigation, down to 1859 at least, he kept the Plaintiff out of possession.

The Plaintiff has lost the interest on the purchase-money, and the nature of the property is such that there can be no measure of damages founded on the rents and profits, or the value of the use of the premises, which furnishes any indemnity.

Within the principle of the cases referred to, and, as I think, in most just conformity to reason and equity, the Defendant should be charged with the amount of that interest, as damages, down to the time when the Plaintiff was let into possession.

Second. That in order to avoid multiplicity of suits, it was proper to decree compensation for waste committed by the Appellant, does not appear to be questioned.

No exception to the report of the referee, nor to the interlocutory decree directing the allowance, appears.

To proceed with the cause to the rendering of full and complete justice between the parties, and, if possible, put an end to the litigation, is the familiar practice of the Court (Story's Eq. Jur. §§ 794-799, and cases above referred to).

Third. To what time ought the damages to be computed and allowed?

I. As to the damages for keeping the Plaintiff out of possession.

I have no hesitation on this point. They should be allowed down to the time when the Defendant surrendered possession; or, if he be in possession at the time of the assessment, then to the time of making the allowance.

In this case the Supreme Court have deemed it proper to allow the computation by the referee down to the date of the interlocutory decree only. I do not perceive any just reason for this. It was certainly not intended to furnish the Defendant a premium for protracting the litigation, concerning the damages, through many years.

If it was proper to allow the damages accruing after the commencement of the suit, it was proper to allow them down to the time when they were assessed.

This is true, even at law, in those cases in which damages arising after suit brought may be taken into view. The time of the assessment will be the time to which they are allowed.

No reason can be assigned for not allowing to the purchaser his damages by reason of being kept out of possession, when, according to the general rule above stated, he is bound to pay interest on the purchase-money down to the final decree and its actual execution.

II. As to the damages for waste committed pendente lite.

They also have been allowed down to the interlocutory decree.

Why not then down to the time of the assessment? The suggestion that they are not within any issue between the parties begs the question, and assumes that such damages are not within the exercise of the jurisdiction of the Court in such cases, which is the very question. If it is according to the practice of a Court of Equity, and is reasonable and just, that a Defendant so unlawfully withholding possession and committing waste, shall be compelled, not only to convey, but pay all damages down to the time he surrendered the posses-

sion, then those damages are within the proper range of inquiry, and he is for that reason perfectly apprised, from the moment a bill is filed, that for those damages he can be required to respond in that suit.

The commission of waste does not, in respect to this particular question, differ from any bad management and deterioration thence ensuing, of which an example is found in Ferguson *v.* Tadman, and Ruck *v.* Tadman (1 Simons, 530), where the purchaser, by agreement of purchase made in May, 1818, was entitled to possession at Michaelmas following, and being refused, filed his bill immediately (November, 1818) to enforce performance of the contract, which was decreed, and in September, 1823, the purchaser obtained the possession, and it was shown that the estate had become much deteriorated by mismanagement and neglect by the default of the vendors. The amount was ascertained down to the time when the purchaser was let into possession, and was allowed to him. This period was very nearly the precise period during which the suit was pending. So, also, in Foster *v.* Deacon (3 Mad. 394), by the agreement made in October, 1815, the purchaser was to have the rents and profits from Michaelmas following; the vendor, however, remained in possession, and in 1818 a decree was obtained for a specific performance, and on motion, it was referred to a master to inquire what allowance should be made for deterioration. The Vice-Chancellor says: "If there had been wilful waste by the vendor, I should have had no hesitation in making him answer for the same . . . ; but it is waste occasioned by negligence." He then shows the liability of the vendor, as the delay was by his fault, and his liability for the negligence of his tenant, and referred it to a master to inquire into the amount of deterioration by unhusband-like conduct and mismanagement to be allowed to the purchaser.

The case of Nelson *v.* Bridges (2 Beavan, 239) is also entirely in point to the rule that the Court will in the same suit give compensation where the vendor has, pendente lite, abstracted stone or minerals which formed a prominent part of the value of the lands sold.

There, it is true, the Court deemed a supplemental bill necessary in order to bring the matter under adjudication, but it was not deemed doubtful that it was a proper subject of decree for compensation or allowance in the suit; and it was in express terms declared that if it had been known to the Court, at the first hearing, the Court would have put, in a due course of investigation, the question of the amount of compensation to be made to the Plaintiff.

In the other two cases above referred to, the motion being made in due season, a reference was ordered.

In the last case a supplemental bill being filed, an issue quantum damnificatus was awarded.

In the present case the subject was before the Court at the first hearing. The decree awarded compensation in damages for the waste. There was no ground whatever for stopping the inquiry at that date. The cases above referred to show that the Plaintiff is entitled to be allowed for all damages down to the time when he is let into possession. And the interlocutory decree, in the present case, contemplated an inquiry, not exclusively into the past, but directed an inquiry which, to the referee, was to be a present inquiry—How much, at the date of his report, have the premises been damaged by the Defendant's waste?

Fourth. The remaining question is: Shall the vendor be charged with interest upon the damages?

This question must also be considered in reference to the nature and ground of the damages awarded.

1st. The damges caused by the mere fact that the Plaintiff has been kept out of possession.

These damages are a substitute for the rents and profits which the purchaser was entitled to receive and enjoy.

Now, if this case had not been peculiar in the particulars above averted to, and the decree was therefore that the Defendant account for and pay over the rents and profits received by him, it would, I think, hardly be doubted that the vendor should be charged with interest.

Surely a Court of Equity should not be less just in this respect than a Court of Law; and in Jackson *v.* Wood (24 Wend. 443) it was held that in ascertaining the mesne profits to be allowed to a Plaintiff in ejectment, the Plaintiff was not only entitled to interest, but the premises being situated in the city of New York, where rents are payable at quarter-days, it was proper to compute the interest upon the rents from each usual quarter-day to the time of the assessment.

Now, it is not material to this question that the measure of damages in this case is not rents, but a compensation in lieu of rents, viz., a sum annually equal to the interest on the purchase-money paid. This is allowed as damages. It is just what the Plaintiff paid out from year to year. It is allowed, *not as interest,* but as annually lost by being kept out of possession—allowed, because, from the peculiar circumstances of the case, there is no other equitable and yet safe rule of indemnity.

Interest should therefore be allowed from the end of each year; not compound interest, but simple interest to date of the report.

2d. The damages caused by waste are not within any such rule. The *actual* amount of *depreciation* caused by the waste —to wit, the value of the timber, clay, &c., taken away—is to be allowed. But that being allowed, the purchaser obtains the full value of the premises purchased, and all just indemnity.

Thus, first, he obtains possession of the premises. Second, he obtains an assessment in amount equal to the deterioration.

These place him in the same situation in which he would be if the premises had not deteriorated when he obtained possession.

Then, finally, he has, as further damages, what he is deemed to have lost by being kept out of such possession.

The result is, that he would be more than indemnified if he was permitted to add interest on the deterioration.

He is, however, entitled to interest as damages on that deterioration from the time when he was let into possession, because, at that time, all allowance for damages arising from being kept out of possession ceases, and because as to the amount of deterioration caused by waste, he can *never* be let into possession.

The result is, that, for the time the Plaintiff was kept out of possession, he should be allowed, as damages, his loss—to wit, an annual sum equal to the interest on the purchase-money.

He should be allowed the damages sustained by the waste committed by the Defendant—i. e., the value of the property carried away.

These amounts should be allowed down to the time when the Plaintiff was let into the possession.

Interest should be allowed in ascertaining the damages caused by the delay in admitting the Plaintiff into possession, computed on each annual amount from the end of each year down to the time of the assessment or report.

Interest should only be allowed, in estimating the damages caused by waste, from the time when the Plaintiff was let into possession; and on the aggregate amount of such depreciation, interest may properly be allowed down to the time of such assessment or report of the referee.

The judgment must therefore be reversed; and as this reversal in part sustains the Plaintiff's appeal, and in part that of the Defendant, it is proper that the reversal should be without costs to either party.

The case should therefore be remitted, to have the damages ascertained in conformity with these views.

WOODRUFF, J., to settle the decree.

All reverse.

JOEL TIFFANY,
State Reporter.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. THE CITIZENS' GAS-LIGHT COMPANY OF BROOKLYN, APPELLANTS, *v.* THE BOARD OF ASSESSORS OF THE CITY OF BROOKLYN, RESPONDENTS.

*Corporations—Taxation—Statute—Capital—Real Estate—Certiorari.*

As against corporations, the rule of taxation is just when based upon the amount of capital paid in, or secured to be paid in, after deducting therefrom the amount of such capital actually paid for real estate, assessing the remaining capital at its actual value, and leaving the real estate to be assessed upon individuals in the town or ward where situated.

The mains, or under-ground pipes of a gas company, under the streets of a city, cannot be regarded as real estate, under the statute, for the purpose of taxation.

The office of the writ of certiorari, sued out of the Supreme Court to review the proceedings and determinations of inferior tribunals, extends to the review of all questions of jurisdiction, power, and authority of the inferior tribunals to do the act complained of; and to all questions of regularity in the proceedings.

The judgment of the Supreme Court upon these questions of regularity, jurisdiction, etc., is reviewable in this Court.

*Lucien Birdseye* and *Joshua M. Van Cott* for Appellants.

*A. McCue* for Respondents.

---

*Certiorari—Office of writ.* 48 *N. Y.* 100; 55 *N. Y.* 602; 112 *N. Y.* 609,) 20 *St. Rep.* 820); 152 *N. Y.* 430; 158 *N. Y.* 428; 172 *N. Y.* 40; 6 *Hun,* 111; 11 *Hun,* 293; 13 *Hun,* 643; 16 *Hun,* 194; 2 *T. & C.* 147; 25 *Hun,* 135; 59 *Barb.* 404; 8 *Abb. N. S.* 282; 1 *Lans.* 89; 3 *Lans.* 82; 5 *Lans.* 145; 1 *Sheldon,* 361; 42 *St. Rep.* 23 (16 *N. Y. Supp.* 705); 27 *Misc.* 38 (57 *N. Y. Supp.* 759).

*Taxation—Corporations—Value.* 80 *N. Y.* 257; 95 *N. Y.* 562; 126 *N. Y.* 444 (38 St. *Rep.* 237); 6 *Hun,* 588; 61 *Barb.* 283; 6 *Lans.* 108; 13 *Abb. N. C.* 8; 64 *How. Pr.* 407; 1 *Sheldon,* 348.

*Taxation—Real estate—Gas mains.* 19 *Hun,* 462; 2 *Lans.* 299, 31 *Misc.* 164 (64 *N. Y. Supp.* 536).

*Certiorari—Tax assessment—Deduction.* 39 *N. Y.* 516; 103 *N. Y.* 372 (3 *St. Rep.* 615); 57 *Barb.* 382.

MASON, J.—That the Assessors, in this case, have disre-

garded the mandate of the statute, requiring them to put the price paid by the corporation for its real estate upon the assessment roll, is apparent from the return itself. That they have, by this error, put it out of the power of the Supervisors to assess a proper tax upon the capital of the Relators is, to my mind, equally clear. The Revised Statutes, as amended by the acts of July 21, 1853, and April 15, 1857, prescribe a complete scheme for taxing corporations. The second section (1 R. S. 414) requires the president, cashier, secretary, or other proper officer of every such incorporated company, on or before the first day of July in each year, to make and deliver to the Assessors, or one of them, of the town or ward in which such company is liable to be taxed, a written statement, specifying:

1. The real estate, if any, owned by the company, the towns or wards in which the same is situated, and the sums actually paid therefor.

2. The capital stock actually paid in and secured to be paid in, excepting therefrom the sums paid for real estate, and the amount of such capital stock held by the State, and by any incorporated literary or charitable institution; and,

3. The town or ward in which the principal office, or place of transacting the financial business of such company, is situated; or, if there be no such principal office, the town or ward in which its operations are carried on, or in which it is liable to be taxed.

By the sixth section of the said statutes, as amended by chapter 654 of the Laws of 1853, the Assessors are required to insert in the first column of their assessment rolls, the name of every incorporated company in their respective towns or wards liable to taxation on its capital, or otherwise; and, under its name, they shall specify the amount of its capital stock paid in, and secured to be paid in; the amount paid by such company for real estate then belonging to such company, wherever the same may be situated; the amount of all surplus profits or reserved funds exceeding ten percent. of their capital, after deducting therefrom the said amount of said real estate, and the amount of its stock, if any, belonging to the State,

and to incorporated literary and charitable institutions; and, in the second column, they are required to enter the quantity of real estate owned by such company, and situated within their town or ward; and, in the third column, the actual value thereof, estimated as in other cases (1 R. S. 416); and, in the fourth column, they are required to enter the amount of the capital stock of every incorporated company paid in, and secured to be paid in, and of all surplus profits or reserved funds, as aforesaid, after deducting the sums paid out for all real estate of such company, wherever the same may be situated, and then belonging to it, and the amount of stock, if any, belonging to the people of this State, and to incorporated literary and charitable institutions (Laws 1853, ch. 654, 1 R. S. 416; 3 sub. sec. 6, amended by ch. 654 of the Laws of 1853).

These provisions of the statute are all of them mandatory. The language employed in the statute is, *"they shall enter"* these things in the assesment roll, and nothing short of a strict compliance with these requirements of the statute will excuse them. The effect of these provisions of the statute is to require the Assesors to put the real estate of the corporation into the assessment roll at the price paid for it, and no duty is imposed upon them at all in regard to assessing the value of the real estate, except that specified by the second subdivision of the sixth section of 1 R. S. 415, which requires them to enter in the second column the quantity of real estate owned by such company, *and situated within their town or ward;* and, in the third column, the actual value thereof, estimated as in other cases. This is to enable the assessment to be made to conform to the provisions of the sixth section of 1 R. S. 389, which requires *the real estate of all incorporated companies to be "assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals"* (1 R. S. 389, § 6). Not so as to the real estate owned generally by the corporation; there is nothing in any of the provisions of the statutes requiring the Assessors to carry into the assessment roll the quantity of real estate generally owned by such corporation, or to assess the value thereof. And no such gen-

eral assessment of the value of the real estate generally of these corporations, when situated out of their town or ward, is ever made by the Assesors, and if they were so to assess the real estate outside of the limits of their own jurisdiction their assessment would be without any warrant of law. They would simply perform extra-judicial duties having no binding force. A corporation may own lands in any State in the Union, whenever they can obtain the consent of such State to do so, and the Assessors can have no means of assessing their value. This impracticability has led, as we have already seen, to an entirely different mode of ascertaining to what extent the capital of the corporation is invested in real estate.

The duty is imposed upon the officers of the corporation to make an annual statement, on or before the first day of July, of the real estate owned by the company, and the price paid for it, and where situated. This statement must be sworn to by one of the officers of the corporation named in the statute, and forms the basis of the value of its real estate for all purposes of assessing the capital stock of the company. This scheme of the statute is to have placed in the assessment roll the amount of capital paid in, and secured to be paid in, and the amount of its capital paid out for real estate then belonging to such company, wherever the same may be situated, together with the amount of surplus funds exceeding ten per cent. of their capital, after deducting therefrom the amount paid for its real estate, and the amount belonging to the State, and to incorporated literary and charitable institutions (Laws 1853, ch. 654); and these are to be made the basis of the assessment; and, as there is no provision for carrying any general assessment of the value of all the real estate wherever situated, into the assessment roll, it is apparent that the assessed value of the real estate generally, so far as it is to be taken into the account in ascertaining what assessment shall be made upon its capital, is the price paid for such real estate, and the price paid is to be deducted from its estimated capital; and this real estate is to be assessed as other real estate of individuals, in the town or ward where the same is situated, at its value, whether more or less than the price paid for it. It is

necessary to consider, in this connection, the act of April 15, 1857. It is proper to say that this act does not, in terms, repeal any of the sections of the Revised Statutes to which we have referred. Nor does it repeal anything contained in chapter 654 of the Laws of 1853.

The act of April 15, 1857, amends the fifteenth section, 1 R. S. 417, so as to read as follows: "The amount of taxes assessed on all incorporated companies liable to taxation, shall be set down by the Board of Supervisors in the fifth column of the corrected assessment roll, and shall form a part of the moneys to be collected by the collector." This is precisely the same as the fifteenth section of the Revised Statutes, and the amendment then declares that "The capital stock of every company liable to taxation, except such part as shall have been excepted in the assessment roll, or as shall have been exempted by law, together with its surplus profits or reserved funds exceeding ten per cent of its capital, after deducting *the assessed value* of its real estate, and all shares of stock in other corporations actually owned by such company, which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value, and taxed in the same manner as the other personal and real estate of the county" (Laws of 1857, ch. 456, vol. 2, p. 2). The assessed value of the real estate spoken of in this section must be construed to mean the value as ascertained by the mode of assessment prescribed in the provisions of the statute above referred to.

These several statutes are "in pari materia," and relating to the same subject, and must be read together in construing them, because they are considered as having one object in view, and acting upon one system (Smith on Stat. Con. 752, § 639). This rule of taxation is certainly just when based upon the amount of capital paid in, or secured to be paid in, and after deducting the amount actually paid out for real estate, to assess the remaining capital at its actual value, leaving the real estate, as the law leaves it, to be assessed like other real estate upon individuals in the town or ward where situated. This, I am satisfied, is the scheme and mode of taxation of the property of corporations as prescribed by these statutes, taken and

considered in their connection, which is the only legal rule of construction to be applied to them.

There is, however, another construction of section 3 of the statute of 1857, which no less clearly shows the error in the assessment under consideration. It is this: that the direction, in that section to deduct the assessed value of the real estate, applies only to the manner of ascertaining the amount of the surplus profits—that is to say, from the whole value of the real estate, and all shares of its stock of other corporations owned by said company which are taxable on their stock. Obviously, the balance will be the amount taxable, as capital and surplus ten per cent. being deducted from such surplus, as previously directed).

A careful reading of this act of 1857 suggests that this mode of ascertaining the surplus was in contemplation; and yet, it remains equally certain, as under the views above expressed, that the assessment before us was erroneous, as this construction in nowise affects the duty of the Assessors to deduct the sums paid for real estate from the capital stock, before assessing the value thereof. This latter construction, nevertheless, involves the necessity, for the purpose of ascertaining the surplus, of bringing into view real estate which may be situated out of the town or ward, or even out of the State, which would, as before suggested, be impracticable. We are therefore driven to the alternative of imputing to the Legislature the enactment of a provision which, by using the term *"assessed value,"* means that an estimate may be put upon the real estate wherever situated, which would be impracticable, or, of using the words *"assessed value"* in a sense in harmony with the whole scheme and plan of the statutes, viz., to tax capital and surplus not expended in the purchase of real estate at its value, and to tax such portions of its real estate as lie within the town or ward in which the assessment is made at its value, as other real estate is assessed, leaving its other real estate (if any) to be taxed wherever it may be situated.

This rule was wholly disregarded by the Defendants in this case, in making up the assessment role against the Relators. In the sworn statement furnished to the Defendants by the Re-

lators, as required by the statute, the capital paid in, and secured to be paid in, is put down at $1,000,000, and the amount paid out at $856,358.26. The Assessors refused to make the assessment roll against the Relators conformably to said statement, and determined to deduct from the amount of the capital stock only what they estimated the actual value of the real estate of the said corporation to be, instead of the sum which the said corporation actually paid for the real estate then owned by it. They assessed the real estate only of the value of $214,800, and deducted the same from its capital of $1,000,000, leaving a balance of $785,200 of its capital subject to taxation. Now, it is no answer to say that a portion of this real estate, as embraced in the Relators' statement to the Defendants, was for large iron mains laid in the streets to conduct their gas to their customers; for of this sum of $856,358.26, the sum of $505,928.26 was paid out and expended by the Relators for land, and the construction of buildings and works thereon, and this sum should have been deducted from the amount of their capital, irrespective of the question whether these iron mains are to be regarded as real estate or not.

We must look to the statute, instead of the common law, in determining whether these iron mains which run under the streets of the city are to be regarded, for the purposes of taxation, as real estate or not, as it is a matter of statute regulation entirely.

The statute declares that "The term 'land,' as used in this chapter, shall be construed to include the land itself, all buildings and other articles *erected upon* or affixed to the same, all trees and underwood growing thereon, and all mines, minerals, quarries and fossils, in and under the same, except mines belonging to the State; and the terms 'real estate,' and 'real property,' whenever they occur in this chapter, shall be construed as having the same meaning as the term 'land,' thus defined" (1 R. S. 387, §8; 1 R. S., 5th ed., 905, § 3).

Under this statute was held, in the case of Boreel et al. *v.* The Mayor, that incorporeal hereditaments were not subject to taxation as land, or real estate (2 Sandf. S. C. 552; see also 4

Paige, 394.) These mains running under the streets of the city, not being erected upon or affixed to the Relators' land, cannot be regarded as real estate, under the statute, for the purpose of taxation. The mains are not real estate, as that term is defined in the statute regulating the assessment of taxes, and I do not think they can be held as fixtures under the common doctrine upon that subject. The only remaining question is, whether the Supreme Court, in virtue of its supervisory power over inferior tribunals by means of the common law writ of certiorari, had jurisdiction, and ought in plain and clear duty, under the law, to have corrected this error of these Assessors.

It is claimed and insisted by the Defendants, that how far, and in what cases the Supreme Court will exercise this power of review, are questions addressed to the sound discretion of that Court, and as that Court have quashed the writ in this case, their discretion cannot be reviewed in this Court. I cannot assent to this proposition, when applied to a case like the present. The office of this writ of certiorari, when issued out of the Supreme Court to review the proceedings and determination of inferior tribunals, has fixed limits, that may be regarded as settled by the adjudged cases in this State, although it must be conceded that there is great conflict in the decisions, when we get beyond a certain point in the functions of the writ. I think we may safely say that the following rule may be deduced from adjudged cases in this State, viz., that its office extends, unquestionably, to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do acts complained of, and all questions of regularity in the proceedings—that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the expressed terms of the statute law, or by a well-settled principles of the common law. The following cases are referred to as fully sustaining these propositions: 20 John. 80; 6 Wend. 566; 10 id. 421; 15 id. 452; 8 Cow. 13, 16; 7 id. 108, 136, 137; 17 Wend. 464; 20 id. 103; 2 Hill 9, 11; id. 398; 6 How. 25; 6 Cow. 570; 2 Wend. 395; 5 id. 98; 32 Barb. 131; 43 id. 232; 3 Seld. 152; 3 Kern. 223; 23 N. Y. 192, 222; 26 id. 163.

I cannot assent to the proposition, that when the Supreme Court have issued the writ, heard the case upon the return, and have committed a plain error in law, and have come to the conclusion, erroneously, as in this case, that the Assessors have kept within the boundaries prescribed by the statutes, and therefore hold that the Relators can take nothing by the writ, and give judgment quashing the writ, that such judgment is not subject to review in this Court. The judgment of the Supreme Court, in such a case, is not rendered upon the ground that the proceedings ought not to be reviewed by the writ, or that it was improvidently issued, but upon the ground that the allegations of error have not been sustained in the given case. Since the decision of the several suits growing out of the tax assessments in the city of Poughkeepsie, there is no redress to the citizen against illegal assessments like this, if it is not afforded upon this common law writ of certiorari, which it certainly can be, so far as to require the Assessors to keep within the rules of law, and comply with terms prescribed by the statute. The judgment of the Supreme Court must be reversed, and judgment given for the Relators, directing and requiring that the sum of $291,128.26 be stricken out of the capital stock in said assessment, leaving the assessment to stand as thus corrected.

Concurring: HUNT, WOODRUFF, DWIGHT and BACON, JJ.

For affirmance: GROVER, CLERKE, and MILLER, JJ.

MILLER, J. (dissenting.)—This is an appeal from an order of the Supreme Court, in the Second Judicial District, quashing a writ or certiorari, with costs.

On a petition of the Relators, alleging certain errors in the assessment roll made by the said Board for the year 1866, the Supreme Court made an order that a writ of certiorari issue requiring the Board to return its proceedings in that behalf to the said Court.

A return having been made, and the parties heard on the merits, the Court quashed the writ. The Relators were incorporated as a gas company, under the general act passed in 1848.

In June, 1866, they made their annual written statement,

under oath, to the Board of Assessors, in which they set forth that their nominal capital was $1,000,000, and that they had paid for their real estate $856,358.26. They returned no surplus or reserved profits, and made no claim to exemption from taxation.

The Assessors, instead of deducting the sum stated to have been paid for real estate from the actual value of the capital, put down the actual value of the capital at $1,000,000, and deducted from it only $214,800; putting that sum in the roll as the "valuation of the real estate." It appears by the petition on which the certiorari was issued, that the sum specified in the annual statement as the price paid for the company's real estate was made up of two items—one, $505,928.26, being the cost of land, and the buildings and fixtures thereon; the other, $350,-430, being the sum paid for iron mains, and for laying them in the streets, &c., the mains being regarded as affixed to the land, and of the nature of real estate.

In their return the Assessors state that they have estimated the capital stock of said company at $1,000,000, its actual value; that they deducted "the assessed value" of the real estate—$214,800—from the estimated value of the capital stock, and assessed it at $785,200 for personal property. Referring to the annual statement, they further say, "that the secretary included in the amount named as paid for real estate, the amount paid for pipes owned by the said company, and which were laid in the streets of the city of Brooklyn, and not upon any premises of said company, and that the amount named as aforesaid is, therefore, not the amount paid by said company for real estate, or the value of its real estate, but is, excepting the sum of $214,800, composed of items of personal property."

The return was heard at the General Term in the Second District, in December, 1866, and an order was made quashing the writ of certiorari, with costs.

Judgment was entered, and the Relators appealed to this Court.

The fact that the Assessors have not fully and particularly stated the various items required by the statute (S. L. of 1853,

p. 1240), is not important, provided they have substantially complied with the provisions of the Revised Statutes, and the acts amendatory thereto, in reference to the assessment of corporations.

Although the third section of the act of 1853 requires that the Assessors shall, in the fourth column, enter the amount of the capital stock of the incorporated company paid in, &c., "after deducting the sums paid out for all real estate of the company," I do not understand that this provision is entirely peremptory and controlling; for, if such were the case, there would be no means of correcting the erroneous and false estimates made by officers of incorporated companies for moneys paid for real estate, and expenditures of this character would rest entirely, or at least to a great extent, in the judgment, and sometimes in the entire misapprehension, of the parties who made them.

Such clearly was not the intention of the law, as is especially manifested by the provision of the third section of chapter 456 of the Laws of 1857, which provides that the capital stock of every company liable to taxation, &c., "after deducting the *assessed value of its real estate,*" &c., "shall be assessed at its *actual value,* and taxed in the same manner as other personal and real estate."

The effect of this enactment, I think, is, to qualify the provisions of the act of 1853, and, in connection with the general object and tenor of the statute in question, to leave it for the Assessor to place a valuation upon the real estate, without being entirely confined to the statement of the company. What is the "asessed value," unless it be the value put upon the property by the Assessors? It cannot mean the amount which the Assessors are required to put in the first column of the assessment roll—that is, the price paid for the real estate, as is claimed; because that is not assessed, but simply a statement of the company, which is qualified by the provision referred to, and contained in the act of 1857.

Nor does this construction interfere in any way with the assessment of the real estate in the ward where it belongs, where, as in this case, the jurisdiction of the Assessors extends

over the whole city. The question is not presented as to its effect in case the land was located in other towns, and it is not, therefore, necessary to look at it in that point of view. The effect of this interpretation would produce no injustice; for if the company were aggrieved, they had a right to apply to the Assessors to change and reduce the valuation in accordance with the provision of the statute (chap. 536, S. L. of 1857, § 6, p. 123).

Assuming that I am correct in this construction of the statute, the question then arises whether the Assessors have assessed a larger amount for personal property than was warranted upon the facts presented to them. The petition of the Relators show that they had expended $505,928.26 for land, buildings, and works thereon, and $350,430 for iron mains, and the laying thereof, in the streets of Brooklyn.

The return of the Assessors shows that they estimated the capital stock at its par value, and, after deducting the assessed value of the real estate, have assessed the company for the balance on personal property; and that the secretary of the company included, in his statement of the amount named as paid for real estate, the amount paid for pipes owned by said company, which are laid down in the streets of Brooklyn, and that the amount thus named is not the amount paid for real estate, or the value of real estate but, excepting the sum of $214,800 composed of personal property.

The return of the company, I am inclined to think, must be controlling; and we cannot, in a common law certiorari, measure the weight to be attached to conflicting statements, if the petition and return can be regarded in that light.

We are then to determine whether the mains or pipes laid in the streets were properly assessed as personal property. They were not upon the real estate, but mainly in the streets of Brooklyn, which did not belong to the Relators.

They are liable to be changed or moved at the will and pleasure of the owner, and are not so immediately connected with the real estate as to be attached to the freehold, and so as to make them appurtenances thereto, or a permanent fixture. I think, without examining the numerous cases on the subject of

fixtures, that they must be regarded as machinery, so far as they are attached to the building, and were capable of removal without injury to it (Voorhies *v.* McGinnis, 46 Barb. 242).

Beyond the portion immediately connected with the real estate of the company, I think they cannot be considered as even attached to it, or as anything but detached personal property. I am also of the opinion that they are not included within the definition of the terms "lands," "real estate," and "real property," as defined by the Revised Statutes. The statute regulating the assessment and collection of taxes declares that the term "land," as used therein, "shall be construed to include the land itself, all buildings and other articles erected upon or affixed to the same, all trees and underwood growing thereon, and all mines, minerals, quarries, and fossils in and under the same, except mines belonging to the State; and the terms 'real estate,' and 'real property,' whenever they occur in this chapter, shall be construed as having the same meaning as the term 'land,' thus defined" (1 R. S. 387, § 2). The statute also declares that "the terms, 'personal estate,' and 'personal property,' whenever they occur in this chapter, shall be construed to include [certain articles specified, and] such portion of the capital stock of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate" (1 R. S. 388, §3).

It is very evident, I think, that the pipes or mains of the Relators are not, within the meaning of the statute, real estate, and were not properly to be assessed as such.

I have not discussed the question whether the decision of the General Term can be reviewed, as the views expressed render it unnecessary.

It is, perhaps, appropriate to add, that the petition upon which the certiorari was granted does not set forth any objections to, or make any complaint as to, the manner in which the assessment was made up; and even if it is not in accordance with, and upheld by, the provisions of the act of 1857, it may be questionable whether the Relators are entitled to urge these objections upon the hearing of the certorari.

The Court below rightly quashed the writ and the order made, and the judgment entered thereon should be affirmed.

Judgment reversed. JOEL TIFFANY,
State Reporter.

---

## J. DE PEYSTER OGDEN AND ALBERT W. WRIGHT v. DAVID COLDEN MURRAY, RECEIVER, &c.

*Trustees—Commissions—Foreign Corporations—Custody.*

Where persons are appointed trustees of a foreign company to receive the transfer of title in their names, merely to hold in trust for such company, without becoming custodians of the property, they are not entitled to a commission for the mere use of their names.

CLERKE, J.—The Defendant is the receiver of the Accessory Transit Company, now insolvent.

It was a corporation created by the Republic of Nicaragua; it carried on business in the city of New York.

A purchase was made on its behalf, in December, 1852, of seven steamships, from Mr. Cornelius Vanderbilt, for the purpose of running them on their line between New York and San Francisco, via Nicaraugua. Being a foreign corporation, the company could not then take the title, and have the ships registered in its own name; and on the 30th of December, 1852, the Board of Directors, seven in number, passed a resolution that the Vice-President of the company and two of the Directors be

---

*Trustees—Relations with Cestui que trust.* 120 *N. Y.* 143, (30 *St. Rep.* 782); 147 *N. Y.* 247 (69 *St. Rep.* 526); 1 *Hun,* 212; 4 *T. & C.* 23; 52 *Hun,* 387 (24 *St. Rep.* 453; 5 *N. Y. Supp.* 305); 82 *App. Div.* 50 (81 *N. Y. Supp.* 549); 17 *Misc.* 710 (40 *N. Y. Supp.* 908).

*Trustees—Commissions—When payable.* 98 *N. Y.* 536; 18 *Hun,* 197; 53 *How. Pr.* 447; 15 *Abb. N. C.* 199 (1 *How. N. S.* 183; 3 *Dem.* 290); 5 *Redf.* 623.

appointed trustees to receive a transfer of the ships, and hold them subject to the control and disposition of the company.

These were the two Plaintiffs, Mr. Ogden, the Vice-President, and Mr. Wright, and the third was Mr. Snow, since deceased. Mr. Ogden received, as Vice-President, a salary of four thousand dollars a year.

They were all present at the meeting, and voted for the resolution. They received bills of sale of the ships in their names, and signed an instrument declaring that they had received the bills of sale, and held the ships for the company.

On the 27th July, 1854, the company indemnified each of the trustees, by a bond, in a penalty of $100,000, against any claims and demands on account of the ships. Soon after, an act of Congress was passed, authorizing the company to hold steamships in its own name; and thereupon Messrs. Ogden, Wright, and Snow transferred the title in them to the company, by bills of sale.

After this transfer they addressed a letter to the President and Directors, claiming compensation as trustees, which the company refused to pay.

In 1858 the company became insolvent, and soon afterwards the Defendant was appointed receiver.

After the transfer to the trustees, they had no more to do with the control and management of the ships than any other members of the Board; and the ships were actually run,under the supervision of the whole Board, by Mr. Vanderbilt, as the agent of the company.

The Plaintiffs now claim, by way of compensation, the same commissions as are allowed to executors and administrators. They claim $3,950, being the amout of the commission upon the sum of $1,350,000—the amount paid by the company to Vanderbilt as the purchase money. They also claim interest on this sum of $3,950 from the 27th of January, 1854—making in the whole, $7,900.

It does not appear that the purchase money, or any portion of it, passed through the hands of the trustees, or that they

performed any services, or incurred any risks or responsibilities, beyond taking the bills of sale in their names, and holding them, and executing bills of sale to the company. So that no active duties devolved upon them; and for any responsibilities which they incurred, they were fully indemnified by having the legal title to the ships, and by the bond of indemnity which they subsequently received.

They did not, like executors, administrators, guardians, and other trustees, become the custodians of the funds of the company, receiving its earnings, or paying them out.

They demand the sum of $3,950 merely for allowing their names to be inserted in the bills of sale.

In my opinion, they are not entitled to compensation on any equitable grounds.

In all probability, at the time of the passage of the resolution appointing them trustees, neither they nor any other member of the Board, had any idea that compensation would be required, or was necessary. Not a word was said on the subject at the time the resolution was passed, nor was any intimation given by them of a claim for services at any time, until they presented their demand— more than two years and six months afterwards, when they had transferred the ships to the company.

The judgment should be affirmed, with costs.

All affirm, except HUNT, Ch.J.

JOEL TIFFANY,
State Reporter.

## EDWIN K. SCRANTON AND WILLIAM H. OTIS, RESPONDENTS, *v.* ALVA CLARK, APPELLANT.

*Goods and Chattels—Vendor—Possession—Warrantee.*

Where the vendor is not in possession, a sale of a chattel is, in effect, an agreement to sell, and no warrantee of title is to be implied.

THIS is an appeal to this Court from an order of the Supreme Court, at General Term, reversing the judgment for the Defendant, and ordering a new trial; the Defendant giving the usual stipulation on such appeal.

The action was upon a promissory note made by Clark, the Defendant, for $2,673.37, dated October 16, 1855, payable one year after date, to the order of E. B. Litchfield.

Elisha B. Litchfield transferred the note, before its maturity, A. G. Jerome, endorsing it without recourse.

A. G. Jerome sold and transferred the note to Edwin C. Litchfield, in December, 1857. And when he sold and transferred the note, Jerome delivered it to Edwin C. Litchfield, who had possession of it from December, 1857, to August, 1860, and Jerome had no interest in the note, nor any control or possession of it during that period.

In August or September, 1860, Edwin C. Litchfield transferred the note back again to Jerome, in some transaction between them, and delivered it to him.

In September, 1860, a few weeks after Jerome had thus again received and become the owner of the note, he sold and transferred and delivered it to Elisha B. Litchfield.

Elisha B. Litchfield shortly afterwards transferred and delivered the note to Scranton and Otis, the present Plaintiffs. They sued upon it in September, 1860.

Each of the transfers thus enumerated was accompanied by delivery of the note in question.

The defence was, that the note was paid. The alleged pay-

---

*Sales—Warranty.* 28 *App. Div.* 437 (53 *N. Y. Supp.* 190); 30 *Misc.* 818 (61 *N. Y. Supp.* 1119); 3 *T. & C.* 323; 5 *T. & C.* 65; 35 *Super. ct.* 306; 3 *Daly,* 419.

ment was made to William W. Leland, by crediting him $300 on a note of his in the fall of 1858. Leland, in 1858, exchanged some wild land in Wisconsin, which he considered comparatively worthless, with Jerome, for certain overdue notes, of which he thought no better. He supposes that this note was one of the parcel. Leland never had this note in his possession at all.

He left other notes, which he undoubtedly bought in the transaction with Jerome, with a clerk of Jerome's, and took them away, from time to time, as he had occasion to use them.

In the fall of 1859, after the transaction between Clark and Leland, in which Clark claims to have paid this note to Leland, Leland gave Clark an order on Jerome for the note.

Clark presented this order to Jerome, who was at the time out of health and out of business. He supposed, from Clark's statement, without having any means of refreshing his recollection or looking at papers, that this note was one of those which he sold to Leland, and signed a paper admitting it, under that impression.

The Court charged the jury as follows:—1st. That if Jerome was the owner of the note in 1858, when it was said he sold it to Leland, and he did so sell it, but did not deliver it, then the note is paid, and the Plaintiffs cannot recover.

2d. That if Jerome was not the owner of the note in 1858, at the time he is said to have sold it to Leland, and he did so sell it, and he afterwards became the owner of it, then if Clark had paid it to Leland, who had purchased it, the Plaintiffs cannot recover, because Jerome must be deemed to have warranted the title, and if he acquired the title after a sale to Leland, it then became extinguished by operation of law.

To this proposition the Plaintiffs' counsel excepted. The jury returned a verdict for Defendant, upon which judgment was duly entered; and upon appeal the General Term reversed that judgment and ordered a new trial, and the Defendant appeals from this judgment to this Court.

*L. S. Chatfield* for Appellant.
*James Emott* for Respondents.

BACON, J.—If the charge of the learned Judge upon the trial had stopped at the first proposition enunciated by him, it is possible the verdict might be upheld, because it may, perhaps, be said, that there is some evidence from which the jury might possibly have found that Jerome was the owner of the note in 1858, when it is claimed that he sold it to Leland. The uncontradicted, and, indeed, overwhelming evidence is, that in December, 1857, the note in controversy was sold and delivered to Edwin C. Litchfield, who held it as owner from that time until August or September, 1860, when he sold and transferred it to Jerome, who soon after disposed of it to Elisha B. Litchfield, from whom the Plaintiffs derive their title. It is quite likely that in the transaction between Jerome and Leland, which occurred in the fall of 1858, both parties supposed that this note was among the bundle of securities that were traded off for the wild land; but it is as nearly certain as it can well be rendered by testimony that Jerome had not then either the possession or ownership of the note; and it can hardly be claimed that the jury, if that naked proposition had been left to them upon the testimony, could have found any such facts. The utmost that can be insisted the testimony conduces to prove, it seems to me, is, that Jerome agreed to sell this note, with others, in exchange for the land; that the other notes were handed to the clerk of Jerome, or to Jerome himself, who held them as the depositary of Leland, but that this note was not among the number, and was never in the possession of Leland, or that of his agent.

Assuming this to be the state of the case, the jury were instructed that if they believed that Jerome sold—that is, in effect agreed to sell—this note to Leland, although he was not the owner at the time of this agreement, yet, as he afterwards became the owner, his agreement implied a warrantee of title, and this subsequently acquired title enures to the benefit of Leland, his vendee, and payment to him extinguished the note. Upon this proposition the jury were authorized to find, as they did, a verdict for the Defendant; and the question is, whether the proposition is sound in law—in other words, is there an im-

plied warrantee of title in the sale of a chattel where the owner is not in possession?

It is to be assumed that there was an express affirmation of title by Jerome to Leland.

There was on the one hand, a sale of wild lands, and on the other, a sale and transfer by delivery of certain notes, and an agreement to sell another note, but of which no assignment or delivery was made, and no written transfer executed, purporting to convey a present interest or one in future.

On this precise question—as to the implication of a warrantee on the sale of a chattel not in possession of the vendor at the time—Chancellor Kent, in his Commentaries, states the doctrine without qualification to be, that the rule of caveat emptor applies, and the party buys at his peril (2 Kent's Com. 478). He adds that, "if the seller has possession of the article, and sells it as his own, and not as an agent for another, and for a fair price, he is understood to warrant the title." In support of the rule as thus stated, he cites two or three old cases in the English books. The first is the remark of Tanfield, Chief Baron, in Cro. Jac. 197, to the effect that, if one sell land whereof another is in possession, or a horse whereof another is in possession, without covenant or warrantee for the enjoyment, it is at the peril of him who buys, and it is not reason that he should have an action at the law, where he did not provide for himself. In Medina *v.* Stoughton (1 Salk. 210), Holt, C. J., decided that, where one having possession of a chattel sells it, the affirmation that it is his amounts to a warrantee; but aliter where the seller is out of possession, for there may be room to question the seller's title, and caveat emptor in such case to have either an express warrantee or a good title. These cases seem to have settled the law in England in conformity with the principle laid down by Kent, and we have been cited to no authority doubting or questioning them, unless such an inference may arise from the remark of Buller in Pasley *v.* Freeman (3 Term Rep. 58), which, however, is merely to the effect that, if the seller affirms the chattel not in his possession to be his, he is bound to answer for the title, for,

in such case, the vendee has nothing else to rely upon. This places the liability upon the ground of an affirmation amounting to a warrantee, and it is not at all inconsistent with the principle enunciated in the two cases on which the rule, as stated by Kent, is formed.

In this State the same question was presented, and is very fully discussed, both on principle and authority, in the case of McCoy *v.* Artcher (3 Barb. 323). The effect upon the question of warrantee of title upon a sale, where the property is in or out of the possession of the vendor, is there considered, and the propositions are established, that possession by a vendor of chattels is equivalent to an affirmation of title; and in such case the vendor is held to an implied warrantee of title, even although nothing be said on the subject between the parties. But, if the property sold be, at the time of the sale, in the possession of a third party, and there be no affirmation, or assertion of ownership, no warrantee of title will be implied. In these circumstances, in order to attach any liability to the vendor upon a sale, there must be an affirmation which will amount to a warrantee of the title.

The principle established by this case is followed, and affirmed in Edick *v.* Crim (10 Barb. 445), where the Court cites the case in Cro. Jac. 197, and say the general rule is, that though the vendor of a chattel impliedly warrants the title, yet, when the chattel is not in the vendor's possession, but in that of another, this rule does not prevail. In Hopkins *v.* Grinnell (28 Barb. 533), where the same point arose, the decision was to the same effect, and the proposition, in the terms laid down by Kent, was reiterated and approved.

It is not important to cite authorities from other States, several of which are quoted in the opinion of the Court in the case of McCoy *v.* Artcher, and are to the same effect. These cases in our own Courts settle the doctrine with us, from which there has been no dissent from the earliest case to the present time. The effect of these decisions is sought to be evaded by the assertion of the Defendant's counsel that, in these cases, the vendor had had possession of the things sold, either before or

after the sale, while Jerome not only had possession before he sold, but afterwards. It is not perceived how this fact, conceding it to exist, can vary the principle. The counsel in this part of the argument also insists that Jerome was the owner, and had possession of the note when he sold it. If this were conceded the argument would be at an end, and the proposition we have been employed with immaterial. But it is to be remarked, that the weight of evidence is entirely otherwise; and in the proposition laid down by the Court in this case, the Judge assumes that Jerome was not the owner of the note at the time of the alleged sale, as he undoubtedly was not in fact, but that it was his subsequent acquisition of the title that enured to the benefit of the vendee, so that he could sue the vendor upon an implied warrantee, which, as we have seen, the law does not create, but expressly repudiates. In the case of McCoy *v.* Artcher, the note, which was the subject of the sale, was potentially in the possession of the Defendants, being held by an agent, for their benefit, some time prior to the transaction by which they were sought to be charged.

It is said by the Defendant's counsel that the certificate of Jerome to Clark estops him from making any claim on the note against Clark, and this estoppel followed the note into the hands of those deriving title from Jerome. It is quite questionable whether this certificate was properly admitted in evidence, the effect being, if it had any, to impeach the title to a chose in action, in the hands of another party, after Jerome had parted with it. But, it could not operate as an estoppel, for the simple and obvious reason, that it was given long after the time that Clark had dealt with Jerome, and had professedly bought the note, and he was induced to no action whatever upon the strength of that certificate, or of any representation made in it. It lacks all the elements of a legal and equitable estoppel, and should probably have had no influence in the case.

I think the judgment of the General Term should be affirmed, and judgment, in accordance with the stipulation, rendered

for the Plaintiff for the amount of the note and interest, with costs.

Affirmed.

JOEL TIFFANY,
State Reporter.

---

## LEWIS JOHNSON ET AL., RESPONDENTS, *v.* MYRON H. CLARK ET AL., APPELLANTS.

*Draft--Promise to accept—Authority.*

An agreement by telegram to accept a draft to be drawn upon the party sending the despatch, by the party named therein, is equivalent to an acceptance of such draft.

Authority to draw at twenty days' sight is not an authority to draw at twenty days from date.

But a failure to make the right form of the draft does not preclude the party from making a second draft, so as to comply literally with the authority to draw.

THIS was an action to charge the Defendants as acceptors of a draft, upon a written promise to accept, under the statute (1 R. S. 768, § 8). The promise in this case was a telegram from the Defendants in New York, to one Ingraham at Washington, authorizing him to draw on them for $95, at twenty days' sight. Ingraham drew for the sum named, at twenty days *from date.* The Plaintiffs discounted the draft on the faith of the Defendants' telegram, and the draft was presented to Defendants, who refused acceptance because it did not conform to the authority to draw.

This draft was dated June 4, 1859—the day of the date and receipt of the telegram. On the 20th of August following, the Plaintiffs wrote the Defendants, asking an explanation of the non-acceptance of the draft, stating that they had cashed it

---

*Draft—Promise to accept—Liability.* 84 *N. Y.* 433; 15 *Hun,* 410; 31 *Hun,* 263; 35 *Super. ct.* 166; 40 *Super ct.* 23; 61 *How, Pr.* 174; 1 *City ct.* 414.

upon the faith of their telegram, and intimating that legal proceedings might be resorted to, to collect it.

The Defendants did not answer this letter, but immediately wrote Ingraham as follows:

"NEW YORK, August 22d, 1859.

"B. F. INGRAHAM, ESQ.—*Dr. Sir*:— . . . . We have a letter from Messrs. Lewis Johnson & Co., bankers, of your city, relating to your draft on us, dated some time since.

"You and Mr. Lomax gave us positive assurance that the draft which we made you a small advance on when you were here, should be paid at maturity. Such was not the case. We therefore feel that you should pay the small advance which we made, and settle the matter with your Washington bankers, and we will hand you back Mr. Lomax's draft. What we did was to accommodate you, and we hope you will prevent our having any trouble in the premises, and save us from loss. We shall rely upon you seeing Messrs. Lewis Johnson & Co., and settling the matter with them. . . .

"Yours truly,

"CLARK & FAULKNER."

There is no proof that this letter was ever communicated to the Plaintiffs.

About the middle of March, 1860, the Plaintiffs procured a second draft from Ingraham, on the Defendants, for the same amount, at twenty days' sight, which was dated "June 8th, 1860"—intended, probably, for June 8th, 1859—and thereupon cancelled and gave up to him his former draft.

This second draft was presented to the Defendants on the 15th day of March, 1860, and acceptance was refused. It does not appear that the Defendants at any time had funds of Ingraham's in their hands. The consideration of their promise to accept for him was the Lomax draft referred to in their letter, which, it seems, was not collected.

This action was brought on the second draft above described. The Judge at the Circuit dismissed the complaint.

The General Term ordered a new trial, and from that order

the Defendants appeal to this Court, giving the usual stipulation for judgment absolute in case of affirmance.

*Edward Fitch* for Appellants.
*John N. Whiting* for Respondents.

DWIGHT, J.—The statute upon which this action is based provides that "An unconditional promise, in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance in favor of every person who, upon the faith thereof, shall have received the bill for a valuable consideration."

The telegraphic authority to draw was an unconditional promise to accept, within the statute (Ulster Co. Bank *v.* McFarlan, 5 Hill, 432); and, on the authority of the same case, it is conceded that the promise covered only a draft at twenty days' sight, and that the Defendants were not bound to accept Ingraham's first draft, which was payable twenty days from date. So the Plaintiffs seem to have learned at some time subsequent to the dishonor of the first draft, and hence they procured the second one.

In the meantime the Defendants wrote Ingraham the letter of the 22d of August, which the learned Judge at the Circuit held to be a revocation of the authority to draw. But it is clear that this letter can have had no effect upon the rights of the Plaintiffs. It was never communicated to them, and if it had been it raised no question of the Defendant's liability to them, but contained, rather, an implied admission of such liability, and an appeal to Ingraham to protect them against it. Nor was it in the power of the Defendants to revoke their promise after the Plaintiffs had parted with their money on the faith of it.

The statute makes the promise to accept equivalent to an actual acceptance of the bill to be drawn, or, in other words, a constructive acceptance, which may be treated as if it were actually made; and as such it can no more be revoked after money has been advanced on the faith of it than an actual acceptance written on the face of a bill.

I think the liability of the Defendants was fixed when the Plaintiffs paid their money upon this constructive acceptance of the Defendants; and that when the first attempt to make a draft, to which the acceptance should apply, proved to be ineffectual, it was the right of the Plaintiffs to have another draft, which should be within the prescribed conditions.

Under other circumstances it might well have been a question whether the time which the Plaintiffs suffered to elapse before the second draft was presented was a reasonable time within which to avail themselves of the promise to accept.

But in this case a draft had been drawn immediately, which was refused as not being within the authority to draw. Then, two months later, the Plaintiffs wrote the Defendants, informing them that they had paid their money for this draft upon the faith of the Defendant's promise to accept it, and asking what their objection to it was.

They had a right to wait for an answer to this letter before procuring another draft; and it is not for the Defendants to object that they waited too long. They were fully informed of the the Plaintiffs' claim upon them; and I cannot see that they were prejudiced by the delay to enforce it. I have no difficulty in concluding that, under all the circumstances of this case, the Defendants' promise to accept applied to the draft in suit.

The fact that this draft was post-dated was not material. That date was an evident mistake; and as the draft was payable twenty days from sight, the time of payment was determined by the date of its presentation.

The order of the General Term, reversing the judgment at the Circuit, should be affirmed, and under the Defendants' stipulation judgment absolute should be rendered for the Plaintiffs.

Affirmed.

JOEL TIFFANY,
State Reporter.

## CHARLES G. TILL *v.* GEORGE H. BEYER.

*Replevin—Copartnership—Bailee of one Copartner.*

While one member of a partnership firm cannot replevy the property of the firm from the bailee of another member of the firm, if the pleadings admit the property replevied to be in the Plaintiff, by a failure of the answer to deny the allegation in the complaint, that the goods were the goods of the Plaintiff, and the fact that Defendant holds as bailee of a member of the firm is not stated in the answer, such defence cannot be made available.

THIS is an action to recover the possession of certain machines, alleged by the Plaintiff in the complaint to be "the goods and chattels of the Plaintiff."

The answer denied that the Defendant had become possessed of, or that he wrongfully detained the property in question. It also contains a denial of the value, and an allegation that no demand had been made upon him for the goods.

On the trial, articles of agreement were introduced, which proved a partnership between the Plaintiff and one German in a certain manufacturing business, and that the articles in suit were purchased by the Plaintiff for, and were used in, the said business. Testimony was given tending to show a demand and refusal; and conflicting testimony upon the same point was given by the Defendant.

The Defendant moved to dismiss the complaint—1st. On the ground that German, under the agreement, had an equal interest in the property; 2d. That Defendant's possession or detention of the property is not shown.

The motion was denied, and the Defendant excepted.

At the close of the evidence the case was submitted to the jury, who found a verdict for the Plaintiff.

The judgment entered upon this verdict was affirmed by

the General Term of the First District, and the Defendant now appeals to this Court.

*A. B. Crane* for Appellant.
*Bogardus & Brown* for Respondent.

HUNT, CH.J.—The Appellant insists, with great earnestness, that the machines in question were partnership property; that they were in Defendant's possession by authority derived from the partner German, and that one partner cannot replevy property from the bailee of the other partner. I am of the opinion that these machines were the property of the firm, under the agreement read in evidence, and that each partner, therefore, had an ownership in the same. Without any careful examination of the point, I am also of the opinion that the other portion of the above proposition is sound law, to wit, that one partner cannot replevy property from the bailee of the other partner.

The Appellant's difficulty lies in the application of this law to the present case. In the first place, the pleadings admit the ownership of the property in the Plaintiff, without qualification. The allegation that the goods were the "goods of the Plaintiff" is a sufficient allegation of ownership (Child's *v.* Hart, 7 Barb. 370). This is not denied in the answer, and, under the Code, stands as an admitted fact.

In the second place, the answer made no claim of a holding by virtue of an authority from the partner German. It simply denies the possession, denies a demand, and contradicts the value. Evidence to sustain the alleged defence would have been inadmissible. In the third place, the Defendant did not contend, at the trial, that he held the possession under an authority from German, and asks a judgment on that ground; but insisted, and both German and the Defendant testified, that the Defendant had no possession in any character, or to any extent, and that he did not resist the right of the Plaintiff at once to take the property.

Thus, German says: "The goods were in my possession at

the time they were taken, and not in Defendant's possession. I had possession of the rooms where they were. Beyer had nothing to do with the rooms. I hired the rooms. Beyer did no business there." So the Defendant Beyer testified:—"I had not any possession of the machines. I never exercised any control over those goods. I had nothing to do with the rooms where they were." In his motion for a nonsuit, the Defendant placed himself "on the ground that German, under the agreement, had an equal interest in the property." He makes no assertion, however, that he held by virtue of German's title.

The same thing is to be noticed in the Defendant's request to charge, when the case was submitted to the jury. They are—1st. "That under the agreement in evidence the Plaintiff is not entitled to recover." 2d. "That the Defendant's possession of the property is not proved, and Defendant is not liable." The Defendant's law is well enough, but there are no facts upon which to base its application to the present case, and no attempt was made to raise it on the trial. It is not available to the Defendant on this appeal.

The next objection is, that the Defendant had no possession of the machines, and that no judgment could therefore be rendered against him. The Defendant requested the Judge so to decide, and excepted to his refusal. As I have already stated, and quoted their language, both German and the Defendant explicity swore that the Defendant, in fact, had no possession of the goods. On the contrary, the Plaintiff testified that he discovered this property "at 37th strret, in possession of the Defendant. I asked if he had those things in his possession, and he said he had. I asked him to give them up, and told him they were mine. He refused to give them up."

On his cross-examination he reiterates, in different language, that the Defendant insisted that he held the property for his brother, and would not give it up without an order from him.

The witness Freminau also testified that the Plaintiff demanded of Beyer the goods belonging to him; that Beyer said he had some goods and machinery in his possession, and he held them for his brother, who had debts from German, and he could not give up any part of them without an order from his brother.

This evidence raised a fair question for the jury upon the point of the Defendant's possession of the particular machines in question.

The Judge was not only justified in submitting the question to the jury, but it would have been error to have ruled it as a question of law (Parker *v.* Jervis, Jan. Term, 1867*; Cobb *v.* Cornish, 16 N. Y. 602).

Some other exceptions were taken, but they are without merit, and the judgment should be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

* 1 Transcript Appeals, 88.

## WILLIAM COLEMAN AND OTHERS, APPELLANTS, *v.* THE SECOND AVENUE RAIROAD CO. RESPONDENTS.

*Corporation—Directors as Grantors—Limitation of Action.*

Where a majority of the directors of the company are grantees of the franchises of the company, they cannot buy of themselves the grant for the company, nor can they create, renew, or continue a debt against the company to themselves, by passing resolutions as directors.

*J. W. Edmonds* and *J. H. Reynolds,* for Appellants.

*John Slosson, Wm. Allen,* and *Waldo Hutchins,* for Respondents.

GROVER, J.—It appears from the order reversing the judgment and ordering a new trial, made by the General Term of the Supreme Court, that it was made upon both questions of fact and law. The Code (§ 268) makes it the duty of this Court, upon the appeal, therefore, to determine whether it was correctly made upon either ground.

In 1852, when the grant was made to the Plaintiffs and their assignors, the Mayor and Common Council of the city of New York had no power to make the grant in question (Milhau *v.* Sharp, 27 N. Y. 611, and cases cited). The grant or license was therefore void and of no value.

The railroad was contsructed, not by the grantees, but by the corporation (Defendants). Section 3 of the act relative to the construction of railroads in cities (Laws of 1854, 324)

---

*Corporations—Directors—Personal benefits.* 56 *N. Y.* 461; 84 *N. Y.* 202; 120 *N. Y.* 143 (30 *St. Rep.* 782); 1 *Hun,* 212 (4 *T. & C.* 23); 40 *Hun,* 155; 47 *Hun,* 236 (14 *St. Rep.* 245; 28 *Week. Dig.* 117); 25 *Misc.* 39 (54 *N. Y. Supp.* 431); 2 *How. N. S.* 254; 3 *How. Pr.* 221; 45 *St. Rep.* 236 (14 *St. Rep.* 245; 28 *Week. Dig.* 117).

*Municipality—Unlawful consent.* 156 *N. Y.* 30.

*Limitations—Conveyance.* 91 *App. Div.* 248 (86 *N. Y. Supp.* 550).

makes valid such grants only in favor of such parties and their assigns as have constructed the roads in whole or in part; and such parties only and their assigns are authorized to continue the use of the road upon the route specified in the grant.

The Plaintiffs and their assignors not having constructed any part of the railroad, it is difficult to see how this legislative confirmation of the grant could enure to their benefit. The grant not having been made to the corporation by which the road had been constructed, the confirmation would not enure to its benefit, unless they had become the assignees of the city grantees prior to the passage of the act.

From the evidence it would appear that this was probably the case; but this question is not necessarily involved in the decision of this case, and I shall not examine or determine it. The question in this case is simply whether the Plaintiffs are entitled to recover of the Defendant the two hundred thousand dollars, and the interest thereon, for which the referee gave judgment in their favor. We commence this inquiry with the fact appearing that, at the time the Defendant was incorporated and commenced the construction of the road, the Plaintiffs and their assignors had not any grant, license, or franchise of any validity or value.

The Defendant was incorporated for the express purpose of constructing and operating this road upon the route specified in the grant by the city, upon the terms and according to the conditions required by the city upon making the grant, and to which the grantees agreed, and with which they were bound to comply.

The grantees all became corporators, and a majority of the directors at the incorporation of the company were grantees; and these constituted such majority until 1856. The grant from the city was at the time undoubtedly considered valid. Money was necessary to construct and equip the road, and for this purpose subscriptions for stock were made by the grantees and others.

State Reporter.

That others should subscribe for stock in a company formed to construct and operate this road, with the belief that the grantees, as individuals, had the sole right to do either, and that they could exclude the company from all use of the road, except upon terms thereinafter to be prescribed by them, is possible, but hardly supposable.

That the grantee's directors, acting as directors, and composing a majority of the board, could not make a bargain with themselves, as individuals, binding upon the company to purchase their grant upon the terms fixed by them as directors, is a point already determined by this Court in Butts *v.* Wood, 37 N. Y. R. 317.

If they could not, as directors, make such a contract obligatory upon the company, they could not by their acts as a board bind the company to pay them any specified sum for their grant. If right in this, it follows that the Supreme Court were right in reversing the judgment of the referee; for that judgment can only be sustained upon the ground that this majority of directors, being grantees, had bound the company to them and their associate grantees to pay two hundred thousand dollars as the purchase-price of their grant.

I also think the Statute of Limitations was a bar to the Plaintiff's action. The grantees made a conveyance of the grant to the company more than six years before the commencement of this action. That conveyance was by an instrument, *under seal;* and it is claimed by the counsel for the Plaintiffs that this brings the case within the limitation of twenty years—the time prescribed for the commencement of actions upon sealed instruments. But the action is not upon the instrument. That contains no covenant on the part of the company to pay the Plaintiffs or their assignors anything.

The action is upon the promise of the company, express or implied, to pay in consideration of the conveyance. This clearly falls within the six-year limitation.

It is also claimed that the resolution passed by the board

within six years before the commencement of this suit, acknowledging a debt to the Plaintiffs and their assignors, of two hundred thousand dollars for the grant, takes the case out of the statute. The answer to this is, that a majority of the board passing the resolution were grantees, and that if they could not, as directors, buy the grant of themselves for the company, they cannot create, renew, or continue a debt against the company to themselves by passing resolutions as directors. Again, it is claimed that if the company repudiate the acts of the directors in purchasing the grant of themselves for the company, they must restore the grant.

The answer to this is, that the Plaintiffs have not asked any such judgment. Their claim to recover was based entirely upon the validity of the acts of the grantees as directors, and the judgment of the referee was based upon that only. These acts being invalid, the judgment was rightly reversed, and the order appealed from must be affirmed, with costs, and judgment final given against the Plaintiffs.

JOEL TIFFANY,
State Reporter.

WILLIAM P. VAN RENSSELAER, RESPONDENT, *v.* WILLIAM BARRINGER; THE SAME *v.* GEORGE DE GRAFF (TWO CASES); THE SAME *v.* PHILIP G. HAUER; THE SAME *v.* JOHANNES B. DIETZ; AND THE SAME *v.* JOHN WHEELER (TWO CASES), APPELLANTS.

*Grant—Reservation—Rent—Re-entry—Party in Interest—Referee's Report —Findings of Fact—Variance.*

Where lands are granted in fee with a reservation to the grantor, his heirs and assigns, of a yearly rent, with covenants by the grantee for the payment of such rent, and a right to the grantor, his heirs and assigns, to re-enter upon breach of such covenant, the condition is valid; the covenant runs with the land; the devisee of the grantor is entitled to enforce the covenant and avail himself of the condition against the grantee; or against his assignee, by an action on the covenant, or by an entry and ejectment for breach of the condition. These rights are not inconsistent with the general proposition, that the tenure of all lands in the State of New York is of the State, as that proposition is stated in Van Rensselaer *v.* Dennison (35 N. Y. 393).

Where in such case the devisee of the grantor brought ejectment against the assignee of the grantee in possession, and it appeared that before the commencement of the action the Plaintiff had made an executory contract for the sale of the rents reserved in the grant, and the covenants, etc., therein, and the indentures, etc., relating thereto, to be conveyed upon certain several future payments by the purchaser, and in default of payment the prior payments to be forfeited and the Plaintiff to be released thereby from performance, but until default the purchaser to be at liberty to collect all rents in arrear—Held, that the Plaintiff was nevertheless the real party in interest, and could maintain the action.

Whether an objection that the purchaser should have joined as Plaintiff, if taken in the answer, would have been sustained—Quære?

A conveyance by the Plaintiff pendente lite, although made in pursuance of such executory agreement, does not take effect by relation to the date of the agreement so as to defeat the action.

Where a referee, after finding all the facts above adverted to, and a breach of the condition of the grant by non-payment of the rent, and that the Plaintiff, by reason of such breach, is entitled to recover the land, and that the estate of the Plaintiff therein, by reason of such breach and his re-entry, is an estate in fee, inserts in the case containing all the evidence, a finding or conclusion, "that the Defendant was, at the commencement of the action, and had been for years prior thereto, the owner in fee of the

*Grant—Reservation of rent—Re-entry.* 39*N. Y.* 149; 48 *N. Y.* 268; 4 *Hun,* 812; 41 *Hun,* 141 (3 *St. Rep.* 793).

said premises, and held them immediately of the State, and that the contract upon which the action is brought was one of the assignments by means whereof the title came to the Defendant, and that the Plaintiff had, when the action was commenced, no estate or interest in the prmises"—such conclusion must be disregarded, as in conflict with the law, inconsistent with the facts found and with the conclusion of the referee upon the whole case, that the Plaintiff is entitled to recover.

THESE seven cases were submitted on the argument of the first, as being alike in their material facts, and depending upon the same questions of law.

The first-mentioned action comes to this Court on appeal from a judgment rendered for the Plaintiff on the report of a referee, and affirmed by the Supreme Court, in General Term, in the Third District.

The action is brought to recover the possession of certain lands in the town of North Greenbush, in the County of Rensselaer, claimed by the Plaintiff, in fee, by reason of the breach of the condition in the grant from Stephen Van Rensselaer to Robert Smith, under which the Defendant held; in which grant a yearly rent of eighteen skipples of good merchantable wheat, four fat hens, and one day's service with carriage and horses, were reserved to Stephen Van Rensselaer (devisor of the Plaintiff), his heirs and assigns, with covenants by the grantee for the payment of such rent, and right to the grantor, his heirs and assigns, to re-enter, to have, repossess, and enjoy the lands granted, upon breach of such covenant, and to expel, put out and remove the grantee, his heirs and assigns, and all others therefrom.

The terms of the grant by Stephen Van Rensselaer to Robert Smith, and the devise to the Plaintiff, were (save in the name of the grantee) like the grant and devise fully described in Van Rensselaer *v.* Dennison (reported 35 New York R. 393), and it is not necessary to repeat them here.

The referee found the execution and the delivery of the instrument or lease in fee to Robert Smith, above mentioned; that the same was executed by Robert Smith; that the said Stephen Van Rensselaer was, at the time of the execution thereof, seized in fee of the premises in question; that the Plaintiff, by devise from Stephen Van Rensselaer, and other

transfers and re-transfers in the complaint mentioned, became the owner in fee of the rents reserved in the said indenture, with the covenants and conditions in said indenture contained, and "of whatever interest the lessor retained in the premises," and has continued such owner ever since, and that all the rights of said covenantee (Stephen Van Rensselaer) came to the Plaintiff and remained in him at the commencement of this action; that the Defendant entered upon the premises under title derived through through the said indenture or lease in fee (from Stephen Van Rensselaer to Robert Smith) and through the grantee or lessee therein named; that no part of the rent accruing on said lease in fee, on the 2d day of January, 1862, was ever paid or discharged, although the same was duly demanded on that day, at the place in such lease mentioned for the payment thereof; and a large amount of the rent accruing on said indenture previously to said January, 1862, also remains unpaid.

The case also states (though nothing on the subject is contained in the report of the referee) "that the referee also found the following facts:" The agreement of sale made between the Plaintiff "and James Kidd, dated May 3d, 1861, which embraced the demands in controversy."

"2d. The deed of conveyance from the Plaintiff to James Kidd and Peter Cagger, dated August 12th, 1864, in pursuance and consummation of the said agreement of sale;" and besides the findings above stated, is another in, these words:

"4th. That the Defendant was, at the time of the commencement of the action, and had been for years prior thereto, the owner in fee of said premises, and held the same immediately of the State, and that the contract upon which the action is brought was one of the assignments by means whereof the title came to the Defendant, and that the Plaintiff had, when the action was commenced, no estate or interest in the premises."

The report of the referee further stated, that the Defendant unlawfully withheld the possession of the premises from the Plaintiff at the time of the commencement of this action, and

still unlawfully withholds the possession thereof from the Plaintiff.

And his "conclusions of law are, that Plaintiff is entitled to recover from Defendant the possession of said premises . . . . and that the estate which Plaintiff has established on the trial is an estate in fee, and that Plaintiff should have judgment accordingly, with costs of this action."

The agreement with James Kidd, mentioned by the referee, as it appears by the evidence, and dated May 3d, 1861, was a contract to sell, upon the payments therein mentioned being made, the rents reserved or granted out of and charged upon, or arising from, certain lands, under, upon or by virtue of the grants or leases in fee mentioned in the schedule annexed thereto, and the indentures or leases pertaining thereto, and the lands, estates, hereditaments, . . . . covenants, rights, . . . . conditions, remedies, &c., &c., and all the services, wheat, fowls, money, &c., in which said rents are now reserved or are payable, and all rents now in arrears an unpaid, &c., &c. The said Kidd agreed to pay therefor $41,983.64, and interest from April 1st, 1861—that is to say, $3,847.24 at the present time; $23,000 in three years from April 1st, 1861, with interest, payable quarterly; and $15,136.40 and interest, whenever demanded by the said Van Rensselaer, or by the holder of a certain mortgage on which that sum was then due and unpaid.

Upon the payments being made, the premises, leases, &c., were to be conveyed, and from time to time a portion thereof, in proportion to the amounts paid, estimated in a manner specified.

Kidd was to have authority to receive, collect and sue for, in the name of Van Rensselaer, any and all of said rents in arrear, unless such authority should be revoked, upon any default of payment, as required by the agreement. And if any such default should continue twenty days, all previous payments should be forfeited, and the said Van Rensselaer be fully released and discharged from all obligation to carry out or perform the contract.

On the trial a deed from the Plaintiff to James Kidd and

Peter Cagger, dated August 12th, 1864, was read in evidence, conveying "all his right and interest in the claims involved in this action, and all his interest and right in the said premises to the grantee therein, in pursuance or consummation of his said contract with James Kidd."

The present action was commenced on the 27th of June, 1862, and the case, on the appeal, is certified to contain all the evidence taken before the referee.

*Anson Bingham* for Appellant.
*S. Hand* for the Respondent.

WOODRUFF, J.—I have endeavored carefully to inquire, aided by the ingenious argument of the counsel for the Appellant, and my best examination fails entirely to discover that this case differs in any particular whatever from those in which it has heretofore been repeatedly held in this Court, that under and by virtue of the conveyance in fee from Stephen Van Rensselaer to various parties, of which the grant or conveyance to Robert Smith, now in question, was one, and by virtue of the devise by Stephen Van Rensselaer to the Plaintiff the latter became entitled to enforce against the said Robert Smith, and his assigns, the covenants therein for the payment of the rents therein mentioned, and to enforce the condition for the payment of such rents, by entry, and to maintain an action for, and recover the possession of the lands upon breach of such condition, by non-payment of the rents when due.

Omitting the employment of technical terms, and without reiterating the legal rules and principles by which it has been, with great ability and various learning, demonstrated, the practical result is as above expressed.

The argument and brief submitted on this appeal is a re-argument of this proposition, upon the apparent assumption that the legal effect of the original grant, and the rights and liabilities of the parties claiming under the same, were open questions.

It seems to me that the simple result of the cases which I have stated is definitely and conclusively established.

In the case referred to and relied upon by the counsel for the Appellant, decided in 1852 (De Peyster *v.* Michael, 6 N. Y. 468), the validity of a condition for the payment of rent reserved on a grant in fee, and the right of the assignee of the grantor to enter for condition broken by the assignee of the grantee, is not only not denied, but distinctly recognized.

In Van Rensselaer *v.* Hays (19 N. Y. 68) the question arose under a conveyance in fee by Stephen Van Rensselaer, in the same form as now in question, and the parties were the devisee of the grantor, Plaintiff, and the assignee of the grantee, in possession, Defendant; and it was held that the Plaintiff could maintain an action in his own name for the rent covenanted to be paid.

In Van Rensselaer *v.* Ball (id. 100) it was held that the present Plaintiff was (under circumstances, in all respects material to this point, identical with those now before the Court) entitled to enter, upon breach of the condition for the payment of the rent, maintain an action for and recover the possession of the lands.

In Van Rensselaer *v.* Read (26 N. Y. 558) the decision in Van Rensselaer *v.* Hays is re-examined, and the right of the devisee of Stephen Van Rensselaer to maintain an action on the covenant for the rent, against the assignee of the grantee in possession of the land, is again most distinctly affirmed.

And in Van Rensselaer *v.* Slingerland (id. 580) the case of Van Rensselaer *v.* Ball was further examined, and the effect of the act of 1860 considered; and again the right of the present Plaintiff to maintain an action against the assignee of the grantee, and recover the possession of the lands for the breach of the condition for the payment of the rent, is affirmed.

And again, in Van Rensselaer *v.* Dennison (35 N. Y. 393), in reference to one of these same conveyances by the Plaintiff's devisor, it is declared that, although a grant in fee, the reservation of a perpetual yearly rent as a condition of the estate, is valid, and that such condition runs with the land, and binds the heirs and assigns of the original grantee; and that the

present Plaintiff, the devisee of the original grantor, on breach of the condition is entitled to recover the land. The discussion in each of these cases refers to numerous earlier cases, in which the principles decided lead to the result, and we are referred to others in the Supreme Court, and still others, including the more recent case of Vanderzee *v.* Vanderzee in this Court, to the like effect (36 N. Y. 231).

When to this it is added that in no case has the right of the Plaintiff, in a case like the present, to recover possession for a breach of such condition, been denied, we have no alternative but to say it is settled.

It would be wholly unprofitable, if it were possible, to go again, by way of either dissertation or argument, over the discussion fully, ably, and with great research exhibited in the cases referred to.

It would, in my judgment, be neither useful nor proper to treat the question as an open one. There is therefore but a single question in this case which calls for any further consideration. In Van Rensselaer *v.* Dennison, the contract with James Kidd, which was produced in evidence in this case, was before the Court; but it did not appear that this contract included the indenture and rents then in question. But the force and effect of a similar contract with one Church was considered in the opinion of the Court, and was deemed no impediment to the Plaintiff's recovery.

The referee, however, found in that case, that Church did not, in fact, perform the condition of prepayment of the amount required by the agreement, and so the condition upon which he was to be invested with absolute title was never performed.

In the case now before us the agreement with Kidd is shown to embrace the premises, and it is therefore not immaterial to consider what effect the existence of such an executory agreement, outstanding at the time this action was brought, should have upon the right to maintain the action.

And this question could never arise, except for that provision in our Code of Procedure which requires all actions to be brought in the name of the real party in interest, for there is

no pretence that, by force of that agreement, any legal title to the premises, or to the rents, or to the re-entry, had passed to James Kidd. Upon making the payments provided for in the agreement he was to receive grants, assignments, and conveyance thereof. But it was neither proved nor found that, at the time this action was commenced, he had paid anything except the sum acknowledged to have been paid at the execution of the contract; and if he did not make subsequent payments, he was not to receive title, but the Plaintiff was thereby released from the contract.

It cannot, upon this state of facts, be seriously argued that the Plaintiff had not an interest in the subject-matter of the action, or that the right of recovery, if it existed, did not continue in him, and, if so, the action was properly brought in his name. Non constat, at that time, that Kidd would ever become entitled to the rents, or to the possession of the premises, on default of their payment.

The utmost that could be plausibly suggested is, that Kidd, by virtue of the contract, had acquired such an interest that he might have been a proper party, jointly with the Plaintiff. If this were so, no such objection was taken in the Court below, and no such objection can now be urged.

The fact that, two years afterwards, the Plaintiff executed a conveyance, in consummation of the contract, to Messrs. Kidd and Cagger, is wholly immaterial. There was no propriety in admitting such fact into the case on the trial. Had it been of any importance it should have been set up by supplemental pleading, so far as to constitute the subject of an issue or avoidance. But whether pleaded or not, proved or not, it could not affect the result; it was a transfer of the cause of action after suit brought. The argument urged upon us, that when made it operated by relation retrospectively to pass all the interests embraced in the original executory contract, does not make the act itself any earlier; it is a transfer, pendente lite, whatever it carries with it by relation or otherwise. Such a transfer does not abate the action. It may still be prosecuted in the name of the Plaintiff (Code, 121).

It is proper to notice the somewhat extraordinary and ap-

parently inconsistent statement in the case, that the referee found "that the Defendant was, at the commencement of the action, and had been for years prior thereto, the owner in fee of said premises, and held the same immediately of the State, and that the contract upon which the action is brought was one of the assignments by means whereof the title came to the Defendant, and that the Plaintiff had, when the action was commenced, no estate or interest in the premises."

All the proofs which were given on the trial are certified to be set forth in the case. These proofs, and the other findings of the referee, show, conclusively, that the Defendant's title, and his sole title, is under and by virtue of the conveyance from Stephen Van Rensselaer, the Plaintiff's devisor, reserving rents, &c., as above mentioned; and the same proofs and findings show that the Plaintiff has succeeded to all the rights reserved to the grantor by force of that conveyance.

To say, then, that the Defendant held immediately of the State could, consistently with his finding of facts not disputed, only import that, although he held of Van Rensselaer, and under and by virtue of his conveyance, his tenure was nevertheless of the State; that as a question of law arising under our statutes, or existing in our earlier history, he held as all our lands are held, of the State, and to say, in the face of the express finding of the facts, and in the face of the repeated decisions of the Courts (some of which are herein referred to), that the Plaintiff, who was entitled to the rents arising from the land, who could maintain an action to recover them, who could enter upon the land in case of non-payment, who could maintain an action and recover the possession of the lands for the breach of the condition by non-payment—a condition of the Defendant's title enuring to the Plaintiff's benefit, by which such title might be divested and become vested in the Plaintiff—to say that after condition broken the Plaintiff had no estate or interest in the premises, was to give a legal construction to the rights of the parties wholly unwarranted, and itself at variance with the conclusion of the referee, that the Plaintiff was entitled to recover.

The conclusion of the referee upon the whole case was in

conformity with the law as settled in the previous cases, and it is clear that the apparent error in the Defendant's favor in some of the language of the case, furnishes no ground for disturbing the judgment.

The judgment must be affirmed.

And, as the other six cases were submitted to abide the decision of the first, the like affirmance must follow in each.

All concur. Affirmed. JOEL TIFFANY,
State Reporter.

---

## JONAS BARTLETT AND ADDISON B. GATES, APPELLANTS, v. CHARLES ROBINSON, RESPONDENT.

*Promissory Note—Endorser—Specified Residence—Protest—Notice.*

When the endorser of a promissory note, made and payable in the city of New York, at the time of such endorsement, adds to his name a designation of his residence (e. g., 214 E. 18th st.) where he continues to reside, notice of protest of the note, if deposited in the post-office, must, in order to charge him, be addressed to him at that place; otherwise, if he do not receive the notice, he will not be liable as endorser.

An endorser has the right to designate the place to which notice of protest shall be sent, and such direction must be observed, or he will not, if he do not receive notice, be charged.

The statute of 1857, which in certain cases authorizes the service of notice of protest on the endorser, by depositing it in the post-office of the city or town in which he resides, "directed to him at such city or town," was not intended to abridge the right of the endorser to make such designation of a place within such city or town to which notice might be addressed, and his designation must be observed.

THIS action is brought against the Defendant herein, as endorser of a promissory note, dated "New York, July 18th, 1860," made by J. Bryant Smith, which the Defendant endorsed in the following form, viz.: "Chas. Robinson, 214 E. 18th st."

At the time he endorsed the note he resided at the place so

---

*Reasonable time—Question of law.* 7 *App. Div.* 464 (39 *N. Y. Supp.* 1022).

*Notice of protest—Diligence.* 28 *Misc.* 53 (59 *N. Y. Supp.* 817).

designated, and continued to reside there to the time of the trial of the action.

The note was duly presented for payment in the city of New York, where it was payable, and was protested, and on the next day the notary deposited in the post-office, in the city of New York, a notice of such protest, addressed, "Chas. Robinson, Esq., city of New York," and paid the postage thereon.

The notice did not reach the Defendant, and he did not receive any notice of such protest.

There were at least two other persons of the name of Charles Robinson residing in the city of New York at the time of the making, and at the time of the protest of the said note.

By a statute of the State of New York, passed in 1857 (Laws of 1857, chap. 416) it is provided that, "Whenever the residence or place of business of the endorser of a promissory note . . . . . shall be in the city or town, or whenever the city or town indicated under the endorsement or signature of such endorser as his or her place of residence . . . shall be the same city or town where such promissory note . . . is payable or is legally presented for payment . . . all notices of non-payment . . . of such promissory note . . . may be served by depositing them, with the postage thereon prepaid, in the post-office of the city or town where such promissory note . . . was payable or legally presented for payment . . . directed to the endorser . . . at such city or town."

On a trial of the action before a referee, the service of notice upon the endorser was held insufficient, and judgment was rendered for the Defendant. The judgment was affirmed in the Supreme Court, in General Term, in the First District.

The Plaintiffs appealed to this Court.

*Thos. Stevenson* for Appellant.
*Wm. W. Niles* for Respondent.

WOODRUFF, J.—The condition of the liability of the endorser of a promissory note is, that if upon due demand the note is not paid by the maker, the holder shall give him notice

therof, in order that he may take measures for his own security or protection.

The use of due diligence by the holder to bring such notice home to the endorser stands, by law, in the place of actual notice, even though it be ineffectual, and fails to bring home knowledge to the endorser.

In all cases, then, in which the endorser fails to receive notice (he having done nothing to waive or dispense with it), the question of liability becomes one of diligence. Has the holder used reasonable diligence to give the endorser notice?

That is a question partly of fact, and partly of law, and must be determined according to the circumstances of each case.

What will constitute reasonable diligence in every supposable set of circumstances, cannot be decided by any unvarying rule. Certain efforts, when proved to have been made, have been passed upon by the Courts, and, prior even to the adjudication, been so accepted by mercantile usage and acquiescence, that they may be stated as rules for the guidance of all holders of bills, and the instruction of all endorsers, and it will be seen that they adapt themselves to the changes in the condition of things, and to the conviences and necessities of business.

Thus, in the earlier history of the subject, it was necessary to carry the notice, or send by some messenger, so as to be able to prove its delivery. When communication was established by regular post, under such governmental or official responsibility that a presumption of safe carriage was warranted, and the usages of business men to take their correspondence from such officials in due course were recognized—held, then reasonable diligence was satisfied by the immediate despatch of notice by the post, properly addressed, to the endorser. So delivery of notice at the residence or usual place of business is held reasonable diligence, because the habits of business and of life make it unreasonable to require the holder to pursue the person to whatever place he may at the time happen to be, and also because, presumptively, and according

to the ordinary experience of men, a notice so left will come to his hands.

And so, also, when the residence is unknown. Then diligence in the endeavor to find the person, or to learn his residence, or place of business, is deemed all that is reasonable to require, and that will stand in the place of notice.

Every relaxation of the rule, that actual notice shall be given, is founded on the idea that reasonable convenience in respect to the mode of giving the notice, and reasonable diligence in the endeavor to bring it home to the endorser, should stand instead thereof, or be deemed equivalent to actual notice, and, therefore, it shall avail to the holder, whether it is effective in bringing notice home to the endorser or not. But immediately out of this relaxation grows another correlative right of the endorser to prescribe the place to which such notice may be sent, when he makes his endorsement. He enters into the contract presumptively with knowledge that he may receive personal notice, or that the notice may be sent to his residence or place of business. He knows what contingencies may happen under which a notice so left may fail to reach him in due season. He may know of arrangements of his own which make it important that, in order to reach him in due season, the notice should be forwarded or delivered at a particular place. Now, it is settled that, if he designate such place, the holder may give notice at that place. This is so settled, because it is reasonable diligence on the part of the holder to deliver the notice at the place where the endorser has appointed to receive it, and because, to hold that such notice is not sufficient, is to permit the endorser to mislead the holder, and practically to defraud him.

The designation of the place, by underwriting at the time of his endorsement, is, therefore, an invitation to the holder to deliver a notice, addressed to him as endorser, at that place, and concludes him, so that he may not deny that, for all the purposes and conditions of the endorsement, that shall be deemed his residence or place of business. If he have actually removed, and that fact is known to the holder, another question would arise; but in the first instance, it is clear that a notice at that place should be deemed sufficient to bind him.

Why, then, should not the obligation of the holder who accepts an endorsement with such a designation, and the obligation of the endorser who makes the designation, be reciprocal? I think they are, and that such designation should be deemed a qualification of the endorsement, and import that notice shall be personal, or by delivery at the place designated.

If this be so, then the decision of this case does not depend upon the particular construction of our statute of 1857, but upon a broader inquiry.Thus, before our statute, if the endorser resided in the same town or city with the party seeking to charge him, the notice must be given by actual delivery to him, or at his residence, or place of business. And a delivery, if not personal, would be sufficient at the place designated, and, in my opinion must, in order to charge him, be delivered there. If they did not reside in the same town or city, then a notice sent by mail, and, in order to that, deposited in the post-office, addressed to him at the city or town in which he resided, was sufficient; and if there be more than one post-office in the same township, then addressed to the post-office at which the endorser usually receives his letters.

Now, our statute has substituted a deposit of the notice in the post-office in the same city or town in which presentment for payment is made, "directed to the endorser at such city or town," for the actual carriage, or sending the notice by a messenger, to the residence in certain cases, and among them, "whenever the residence or place of business of such endorser shall be in such city or town."

I apprehend that all that was intended by this statute (in its bearing upon this case) is that, in view of the perfection of our postal system, and the general certainty that men of business will receive letters directed to them coming into our post-offices, such deposit of notice shall be accounted reasonable and sufficient diligence to notify an endorser, as well when he resides in the same town as when he resides in another, and that the statute has no bearing whatever upon the right of the endorser to designate the place to which the notice shall be addressed, the right of the holder to act in pursuance of that designation, the binding effect of such a designation on the

endorser, or the obligation of the holder who accepts an endorsement so qualified. And, therefore, as well when the parties do not reside in the same city or town, as when (according to our statute) they do, or, in short, whenever notice is sent by mail, or deposited in the post-office, the notice must be directed to the endorser, not only at the city or town, but to the specific place designated by the under writing.

In our cities and large towns, where there are often many persons of the same name, such underwriting is very important as a descriptive designation of the endorser, and not only appoints the place where the endorser desires to have the notice come, but tends to identify the person who is entitled to the benefit of the notice.

I think, therefore, that a compliance with what is said to be the letter of the statute, by writing the name of the endorser, and the name of the city, is not satisfying the requirement, that reasonable diligence should be used, and that a just interpretation of the statute requires that the words "directed to the endorser at such city or town," includes, as a part of such "direction," conformity to the prescription which the special endorsement imports.

To the suggestion that the holder ought not to be compelled to take the risk of the handwriting of the endorser, and that if he direct the notice to the designated place, it may turn out that the endorser has no residence or place of business there, and did not write nor authorize such designation, it will suffice to say that no party is bound to accept such an endorsement. He acts voluntarily in accepting the note or bill, and in giving faith to the endorsement. If he takes it, he necessarily assures himself (so far as he deems it necessary or prudent) of the genuineness of all the signatures on which he relies. And yet the signature of a supposed endorser may not be genuine; the holder is at that risk.

So in reference to the authenticity of any qualification of the endorsement. He acts voluntarily and may rely upon it, or not, at his election, and ought to be bound by it.

I think the judgment should be affirmed.

All affirm, except MASON and MILLER, JJ.

MASON, J. (dissenting.)—The Plaintiffs bring an action against the Defendant as an endorser of a promissory note made by J. Bryant Smith, and the following is a copy of said note:

"$271.69-100. New York, July 18, 1860.

"Three months after date, I promise to pay to the order of Charles Robinson, two hundred and seventy-one and sixty-nine one hundredths dollars, for value received, at the office of Collins & Bowne, 96 Broadway.

(Signed) "J. Bryant Smith.

(Endorsed) "Charles Robinson, 214 E. 18th st."

The case was tried before a referee, who found the following facts: "That when the said note became due, it was presented for payment at the office of Collins & Bowne, in the city of New York, where the same was payable, and payment demanded, which was refused. That, on the 22d day of October, 1861, the Notary Public mailed a notice of protest of said note in the post-office in the city of New York, where the Defendant resided, directed to the said Defendant at the 'city of New York,' and prepaid the postage thereon. That the said notice never reached the Defendant, nor did he receive any notice of the protest of said note. That at the time the Defendant endorsed said note, he added below his name a memorandum of his residence, '214 E. 18th st.' That he then and ever since resided at No. 214 E. 18th street, in said city of New York, as indicated and noted by him on said note.'

And upon these facts the referee found that the said note was not properly protested, so as to charge the Defendant as endorser. That the mailing of the said notice of protest to the Defendant, addressed "Charles Robinson, Esq., city of New York," was not sufficient, and he gave judgment for the Defendant, and on appeal to the General Term, the judgment was affirmed; and the Plaintiffs have appealed to this Court.

The law was settled, prior to the passage of the act of April 14, 1857 (chap. 416, Laws of 1857), that when the endorser resides at the place of the presentment and dishonor of the

note, the notice must be served on him personally, or, what was deemed equivalent, must be left at his dwelling or place of business, if he had one there (Ireland *v.* Kip, 10 J. R. 490; Smedes *v.* Bank of Utica, 20 J. R. 372; Ransom *v.* Mack, 2 Hill's R. 587; Van Vechten *v.* Pruyn, 3 Kern. R. 549). This is the language of all the cases, and it is proper to remark that, originally, service through the post was not allowed in any case (Ransom *v.* Mack, 2 Hill's R. 587; 3 Kern. R. 551). The act of April 14, 1857, provides that when the residence of the endorser of a promissory note shall be in the city or town where such promissory note, &c., is payable, or legally presented for payment, all notices of non-payment of such promissory note may be served by depositing the same, with the postage thereon prepaid, in the post-office of the city or town where such promissory note, &c., was payable, or legally presented *for payment, directed to the endorser at such city or town.*

The Notary, in this case, certainly complied with the strict language of this statute in mailing this notice of protest through the post-office to the Defendant, directed to him at the city of New York.

The very letter of the statute was complied with.

There is no ambiguity in the language employed to express the legislative intent of the statute; and where an act of the Legislature is worded in clear and precise terms—when the sense is manifest, and leads to nothing absurd—there can be no reason to refuse the sense it naturally presents. To go elsewhere in search of conjectures, in order to restrain or extinguish it, is to endeavor to elude it. If this dangerous method be once admitted there will be no act which it will not render useless (Vattel, book 2, chap. 17 § 263; Jackson *v.* Lewis, 17 J. R. 477; Smith on the Construction of Statutes, p. 627, § 478). Puffendorf says, that "if *the words of the law express clearly the sense and intention, we must hold to that.*" This is but the affirmance of the general rule laid down by Vattel, as a maxim of interpretation, that it is not allowable to interpret what has no need of interpretation.

The duty of the Court is, when the language is clear and explicit, to follow it and give it its full effect. In such cases the words of the statute are deemed to be the body and soul of the statute, and the letter and spirit are considered as united.

A statute is the declared will of the legislative power of the State. If its language is plain and unambiguous, there is no room for construction.

The language of this statute is clear and perspicuous. It says, in plain words, that this notice of protest may be served by depositing it in the post-office of the city or town, directed to the endorser at such city or town, with the postage thereon prepaid. We are asked to impose a further condition as reasonable and just to secure the interest and protect the rights of the endorser, to wit, to require it to be addressed to the endorser at the number and street of his residence.

This, it is claimed, must be done where his number and street appear by memorandum under his name. The Court below so held, but not, if I appreciate the reasoning of the Court, upon the language or requirement of the statute, but upon the ground that where such a memorandum is made by the endorser, there is an implied contract that such notice of dishonor shall be sent to him at such particular place.

This is wholly unsound. There can be no implied contract in such a case to give any other notice of the dishonor of the note than such as the law requires to be given, and when the statute says that such notice may be served by sending the same through the post-office, with such a general direction, Courts have no right to impose further terms because they think the statute terms unreasonable.

It is our duty to administer the law as it is, and all complaints against the wisdom of the statute would be more properly made to the Legislature, where the evil complained of can be redressed. The service is complete by a mere deposit in the post-office, properly directed, whether it ever reaches the endorser or not. He takes the risk of the mail.

If I am right in the views above expressed, it follows that

the judgment of the General Term, and of the referee, must be reversed, and a new trial granted.

MILLER, J., concurred in the opinion of MASON, J.

Affirmed. JOEL TIFFANY,
State Reporter.

---

## JOSEPH S. HUNTINGTON, APPELLANT, *v.* HORACE B. CLAFLIN ET AL., RESPONDENTS.

*Complaint—Dismissal—Contract—Part Performance.*

Where the Plaintiff disqualifies himself from completing his contract by reason of his intemperance, and is for that reason discharged, he cannot recover thereon.

CLERKE, J.—From the Plaintiff's own evidence it appears that, in January, 1859, he renewed an agreement with the Defendants, by which he agreed to sell goods for them, and to receive a commission of one per cent. on all the goods sold; he was to draw $100 per month to live upon—the balance to remain until the 1st of January thereafter; and, if he did not remain until that time, he agreed to forfeit the balance coming to him.

The same arrangement seems to have been continued for 1860. The Plaintiff says there was no new arrangement made for 1860; therefore, that of 1859 was to be continued, neither party having given any notice to the contrary to the other, although Mr. Claflin says it was continued by the express agreement of both parties. The Plaintiff admits that the arrangement of 1859 "continued through the whole period."

---

*Master and servant—Renewal of employment—Effect.* 79 *N. Y.* 92; 118 *N. Y.* 486 (29 *St. Rep.* 944); 125 *N. Y.* 130 (34 *St. Rep.* 859); 7 *Hun,* 201; 43 *Hun,* 200 (5 *St. Rep.* 399; 26 *Week. Dig.* 56); 87 *Hun,* 398 (68 *St. Rep.* 428; 34 *N. Y. Supp.* 305; 2 *Ann. Cas.* 157); 14 *Daly,* 373, (13 *St. Rep.* 139; 27 *Week. Dig.* 478).

*Dismissal—Exceptions to be heard at General Term—Mistrial.* 30 *Hun,* 167; 9 *Abb. N. S.* 431 (40 *How. Pr.* 440; 2 *Sweeny,* 391).

Between January 1st, 1860, and 23d November, 1860, the Plaintiff made sale of goods for the Defendants to the amount of $275,000, which, at the rate of one per cent. commission, would entitle him to the sum of $2,750, of which sum $1,900 had been paid, leaving due to him, if he had fulfilled his agreement, $850, for which, with interest, he demands judgment.

The answer denied each and every allegation in the complaint

On the trial the Plaintiff testified to the terms of the agreement, which was continued in 1860; that he became intemperate, and was frequently intoxicated in the store, until, at last, Mr. Claflin discharged him on the 23d or 24th of November, 1860

Thus, by his own fault, he was made incapable of fulfilling his agreement by remaining in the store till the end of the year; and he forfeited the balance that was due him.

The commission was to be one per cent. on all the goods he sold, provided he remained there; he did not remain there in consequence of his misconduct, and he is not entiled, according to his own showing, to the balance he claims.

The complaint was properly dismissed. The exceptions to the rulings at the trial are clearly untenable.

As to the objection that there was mistrial in ordering judgment to be suspended, and the exceptions to be heard, in the first instance, at the General Term, this case does not come within the decision in Purchase *v.* Matteson (25 N. Y. 211).

The evidence here was not conflicting; although evidence was taken on both sides, no material part of it was conflicting.

As to the decision in Hoagland *v.* Miller (16 Abb. 103), that it is a mistrial to direct that an exception to the dismissal of the complaint be heard at the General Term, in the first instance, I understand this is at variance with the practice invariably recognized by this Court.

The judgment should be affirmed, with costs.

All affirm.

JOEL TIFFANY,
State Reporter.

THE METROPOLITAN BOARD OF HEALTH APPELLANT, *v.* JACOB HEISTER, RESPONDENT.

THE SAME, Appellant, *v.* THE SAME, Respondent.

JACOB HEISTER, Respondent, *v.* THE METROPOLITAN BOARD OF HEALTH, Appellant.

THE SAME, Respondent, *v.* THE SAME, Appellant.

*Metropolitan Health Bill—Constitutionality—Divisions of State—Judicial Powers.*

The act of 1866, ch. 74, creating "The Metropolitan Sanitary District of the State of New York," is constitutional.

The Legislature have the power to establish new civil divisions of the State, embracing the whole or parts of different counties, and when so established, section two, article ten, of the State Constitution, is not applicable to such divisions. The People *v.* Draper (15 N. Y. 532), affirmed and approved.

Neither is the act referred to in violation of that provision of the Constitution which declares that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolable forever," nor of that article

---

*Constitutional law—Police power.* 70 *N. Y.* 536; 82 *N. Y.* 323; 149 *N. Y.* 201; 174 *N. Y.* 445; 175 *N. Y.* 443, 444; 17 *Hun,* 563; 58 *Hun,* 599 (35 *St. Rep.* 41; 12 *N. Y. Supp.* 561); 67 *Hun,* 53 (51 *St. Rep.* 189; 22 *N. Y. Supp.* 61); 84 *Hun,* 470 (65 *St. Rep.* 477; 32 *N. Y. Supp.* 320); 78 *App. Div.* 573 (79 *N. Y. Supp.* 749); 79 *App. Div.* 188 (80 *N. Y. Supp.* 88); 79 *App. Div.* 195 (80 *N. Y. Supp.* 94); 79 *App. Div.* 211 (80 *N. Y. Supp.* 105); 4 *Daly,* 392.

*Legislature—Power to enable bodies to enact laws.* 7 *Hun,* 216; 20 *Hun,* 140; 114 *App. Div.* 133 (99 *N. Y. Supp.* 783); 3 *Abb. N. C.* 447; 13 *St. Rep.* 785.

*Constitutional—Legislature—Judicial officers.* 17 *App. Div.* 170 (45 *N. Y. Supp.* 350); 1 *City ct.* 404.

*Constitutional law—Legislature—Power to establish offices.* 70 *N. Y.* 375; 73 *N. Y.* 70; 172 *N. Y.* 436; 35 *Misc.* 313, 314 (71 *N. Y. Supp.* 49; 32 *Civ. Proc.* 144, 145); 3 *How. N. S.* 42.

*Trial—Jury—Invocability.* 33 *Hun,* 408; 19 *Misc.* 492 (43 *N. Y. Supp.* 1105; 3 *Ann. Cas.* 381).

which provides that "no person shall be deprived of life, liberty or property, without due process of law." No property or person is injured by this act.

A jury had not been the ordinary tribunal to determine upon questions affecting the public health, prior to the adoption of the Constitution of 1846.

The power to be exercised by the board upon the subjects in question, is administrative rather than judicial in its character.

THE above four cases were submitted to the General Term of the Supreme Court in the First Judicial District, by the parties, under the Code, for the purpose of procuring decisions upon questions that had arisen between them, and which are also involved in several other pending suits.

In case number one the Board claim to recover the penalty given by the statute against one who has violated its order. The Defendant, when the order was made, was engaged as a butcher, in the business pursuit of "slaughtering cattle at his slaughter-house, No. 95 Fourth street, in the city of New York, which said slaughter-house was in the densely populated portions of said city, and was upon a paved street." The Board of Health, the Plaintiff, on said day, as contemplated by the first subdivision of the fourteenth section of the Metropolitan health law (Laws of 1866, ch. 74), "took and filed among its records what (the same being written evidence) the Plaintiff regarded as sufficient proof to authorize its declaration that the same (the using of said slaughter-house for said pursuit) was dangerous to health, and was also a public nuisance." Said proof "consisted of statements of competent persons, under oath, that said business endangered the health of the people of the vicinity, was offensive to their senses, and rendered their life uncomfortable, and of facts sustaining such statements." The Board thereupon "ordered said business to be discontinued, and said nuisance to be abated," but directed that the order should not be executed till the same had been served on the Defendant, and he had been afforded an opportunity to be heard. This order was duly served on the Defendant, and it is admitted "that the Defendant might have applied for, and have had, the opportunity and hearing contemplated in said section, but did not, at any time, apply for the same, but declined or omitted so to do; that the Plaintiff waited more than three

days, as provided by law, after such service, and before commencing the execution of said order." And thereafter a final order was in due course made by the Board, which is set out at length. The police were directed to execute this order, "and the execution of the order was duly commenced;" and "all the doings and proofs and order of said Board in the premises appear among its archives, as the law provides." The submission to the Court below was formally made by both parties. The Defendant's theory was sustained, and judgment ordered in his favor, and an appeal has been taken to this Court by the Plaintiffs.

In case number two, the action is to recover a penalty for violating the ordinances of the Board of Health relative to slaughtering cattle in the city. The case is different from number one, in this, that that related to the power of the Board to make special orders on notice and opportunity of hearing, which may be specifically enforced; but number two relates to its power to pass general ordinances which only involve the liability to pay a penalty of fifty dollars. The leading facts are:

1. That the ordinance in question prohibited, first, the driving, and, second, the slaughtering of cattle in the city of New York south of Fortieth Street; and the Defendant was slaughtering at No. 95 Fourth Street, on a paved street, south of Fortieth Street.

2. The Defendant carried on his business in the "ordinary manner."

3. That one party claims the business is dangerous to life, and the other denies it. That the premises where the slaughtering was done are in a "thickly settled portion of the city, on a paved street," and "that there are sufficient facilities for slaughtering animals at places in the city above Fortieth Street."

4. That the business of slaughtering and driving "animals in the city impairs the enjoyment of life on the part of large numbers of people;" makes it more difficult than it need be to prevent bad meat being sold; "causes large amounts of blood and offal to go into the sewers," etc., "so that unhealthy ex-

halations are generated," etc.; and that, "on trial, the opinions of a large number of the leading physicians of the city were read in evidence, to the effect that slaughtering was dangerous to health," etc., while only one medical opinion was offered to the contrary.

5. On the basis of such facts, the Board of Health exercised its discretionary power of passing the ordinance in question, and it is admitted to have been duly published according to law.

6. It is then admitted that the Defendant violated the said ordinance of the Metropolitan Board of Health on two several days, viz., on the 12th and on the 23d of August, 1867; and one of the questions is, whether a penalty can be recovered for each of the two days on which it was violated, or for only one, the penalty for both being claimed.

7. A formal submission of the case is made by the parties.

8. A decision was made, and an appeal taken, as in the former case.

Case number three arises under a similar ordinance to that mentioned in the second action, and is based on like facts in several particulars; it is further found "that that driving of cattle through the frequented streets of said city is attended with peril to human life," and that no cattle were driven below Fortieth street from the 28th August, 1867, to the making of the submission of the case, which was in January, 1868. But instead of being a suit by the Board to recover a penalty for violating the ordinance, it is an action to prevent the Board from enforcing that part of the ordinance which forbids the driving of cattle below Fortieth Street. This case relates solely to driving, and number two solely to slaughtering. The former is by the Board, to recover a penalty for slaughtering; this, by the butcher, for an injunction restraining the Board from preventing the driving of cattle from Fortieth Street to his place of business in Fourth Street. The decision was in favor of the Plaintiff, and the Defendants appeal to this Court.

Case number four arises on the same state of facts, and relates to the same order as case number one; but it is a suit by the butcher against the board to obtain an injunction to prevent the Board enforcing its order, forbidding slaughtering at the

place to which the order relates. The case differs from number one only at the point where the Plaintiff states his claims and demands his remedy. The Board found the same facts as to the business being "dangerous to health," made the same order, and gave the Plaintiff the same opportunity for a hearing, which he declined, as in case number one. It appears that the record of the decision and proceedings of the Board are preserved among its records. The decision of the General Term was in favor of Heister, and the Board of Health bring their appeal to this Court.

*D. B. Eaton* and *George Bliss* for the Appellants.

*M. V. B. Wilcoxson* for the Respondent.

*Ira Shafer* and *John H. Reynolds* for other butchers in the same situation with the Respondent.

HUNT, Ch.J.—The first point made in the cases before us is, that the act establishing the Metropolitan Board of Health is in violation of the second section of the tenth article of the Constitution of this State. That section is in these words: "All county officers whose election or appointment is not provided for by this Constitution, shall be elected by the electors of the respective counties, or appointed by the Boards of Supervisors, or other county authorities, as the Legislature shall direct. All city, town and village officers whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof as the Legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct." This provision has been before this Court on several previous occasions, and certain positions in relation to it may be considered as settled. Its plain meaning, that all the local officers referred to, whose offices were in existence at the adoption of the Constitution, shall be elected or appointed by the local authorities of which they are the representatives, has been fully sustained. So it has been held, that, to change the

name, or to divide up and partition the duties among several, or to take parts of the duties of several offices and combine them in one, will not be permitted. If the offices in question are county or city offices, and were in existence at the adoption of the Constitution of 1846, it is not competent to vest the appointment of the incumbents in the Governor and Senate. It belongs exclusively to the local power to fill the offices, either by election or by appointment, as the Legislature may direct (The People *v.* Draper, 15 N. Y. 532; The People *v.* Raymond, 37 id. 428; The Mayor *v.* The Board of Police and Acton, —— ——).

As early as 1796, and by repeated statutes, from that time down to the adoption of the Revised Statutes, in 1830, the duty of attending to the health of the city, to cases of infectious disease, to vessels from unhealthy ports, to establishing and regulating slaughter-houses, has been given to, and exercised by, the Mayor of the city of New York, the Mayor, Aldermen, and commonalty thereof, Commissioners of Health, Health Wardens for the city, or some other local officers of that city (3 Greenl. ed. Laws, ch. 38, p. 305; 1 R. L. 1813; Laws 1850, ch. 275).

If the act of 1866 (ch. 74), which we are considering, was an act for the regulation of these subjects in the city and county of New York alone, it would be difficult to sustain it, under the decisions of this Court. The act commences as follows: "So much of the territory of the State of New York, and of the cities, villages, and towns thereof, as now composes the Metropolitan Police District of the State of New York, shall constitute, and is hereby declared, a district to be known as 'The Metropolitan Sanitary District of the State of New York.'" By the act of April 15, 1857, "To establish a Metropolitan Police District, and to provide for the government thereof" (ch. 569), the counties of New York, Kings, Westchester, and Richmond were united in a district, to be called "The Metropolitan Police District of the State of New York." The district over and upon which the powers of the newly created authority now before us are to be exercised, consists, therefore, of

the four counties of New York, Kings, Westchester, and Richmond.

In The People *v.* Draper (supra), it was held, that the Legislature may establish new civil divisions of the State, embracing the whole or parts of different counties, and that, when so established, the provisions of the Constitution under consideration, relative to county officers, is not applicable to such district. It was distinctly stated, in the opinions delivered in that case, that the offices which were affected by the act of 1857 were county offices, and that, if the district over which the new Commissioners were appointed had consisted of the county of New York alone, the act could not have been upheld. The validity of the act was sustained upon the ground that the Legislature had authority to create new civil divisions of the State, embracing more than one county, for purposes of temporary or permanent civil government; not impairing, however, the county organizations, and that officers over such newly created district could legally be appointed by the Governor and Senate. That case is decisive of the validity of the present act. It is not in the least shaken, but sustained and confirmed by the other cases more recently decided in this Court. The same distinctions are there recognized, and the same principles are upheld (The People *v.* Metropolitan Police, 19 N. Y. 188; 26 id. 316; The People *v.* Pinckney, 32 id. 377; Metropolitan Board *v.* Barrie, 34 id. 657). There is, therefore, no objection to the constitutionality of this act, as being in conflict with the provisions of section two of the tenth article of the Constitution of this State.

It is further objected that the act violates the second section of the first article of the State Constitution, which declares that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever," and the sixth section of the same article, which provides that "no person shall be deprived of life, liberty, or property without due process of law." The argument on this point has been conducted by Mr. Heister's counsel, chiefly upon the allegation that, on the question of nuisance or no nuisance, the party complained of had a right to the opinion of a jury, before his rights could be finally

disposed of. It was admitted on the argument by the additional counsel, that a Court of Equity could give final judgment without calling in a jury. It will be observed that in each of the cases now before us, it was alleged and decided that the proceeding was "dangerous to the public health." This was in addition to the charge that it was a nuisance.

No one has been deprived of the property or of his liberty by the proceedings in question. The Commissioners have provided that cattle shall not be driven upon certain streets, except at certain hours of the day. They have also provided that the business of slaughtering cattle shall not be carried on in the city of New York south of a designated line. These regulations take away no man's property. If Mr. Heister owns cattle, his ownership is not interfered with. He may sell, exchange, and traffic in the same manner as any other person owning cattle may do. If he owns a slaughter-house, his property remains intact. He may sell it, mortgage it, devise it, or give it away, and may use it just as any other man, or all other men in the State combined may do. Simply the health regulations of the district operate upon his cattle and his slaughter-house in the same manner that they do upon live property owned by all others, and the use of the streets for dangerous purposes, and the prosecution of a business dangerous to the public health, are regulated by the ordinances in question. This practice is not forbidden by the Constitution, and has been recognized from the organization of the State government, and it is to be found in nearly every city or village charter which has been granted by the Legislature.

Nor, in my judgment, is there any greater plausibility in the argument that the act violates the right of trial by jury. The Constitution recognized the fact that there were certain classes of cases which had not been and need not be tried by a jury. Thus, it does not say that the right of trial by jury shall exist in all cases, but in all cases "in which it has been heretofore used." Equity cases, certain attachment proceedings, and proceedings under absconding debtors' acts, references, appraisals of real estate taken by corporations, and many others, were well understood to have been usually determined

by another tribunal, and were allowed to remain undisturbed (Sands v. Kimbark, 27 N. Y. 147). Passing by the question whether a Court of Equity, of itself, may determine the question of nuisance or no nuisance without the aid of a jury, on which question those appearing for the Respondent do not agree, and passing by the point that any individual or body may abate a nuisance, provided he commits no breach of the peace, I hold it to be clear, that in questions relating to the public health, where the public interests required action to be taken, a jury had not been the ordinary tribunal to determine such questions prior to the adoption of the Constitution of 1846. As early as 1784 an act was passed "to prevent the bringing in and spreading of infectious distempers in this State" (1 Greenl. ed. 117); and in 1794 (3 Greenl. ch. 53, p. 144) it was amended so that "the Governor, and, in his absence, the Mayor of New York, was authorized to do every other act and thing which may be thought necessary to carry into effect the object of this act." No jury was had or was provided for. In 1796 (3 Greenl. ch. 38, pp. 305, 308), the Legislature enacted that "it shall be lawful for the Mayor, etc., in Common Council convened, from time to time, as they shall judge advisable, to make by-laws and ordinances for filling up or raising lots, . . . . cleaning and scouring streets, alleys. sinks, . . . . and for regulating all manufactures of soap, candles, glue, leather, and all other manufactures, and all works, trades, or business causing noxious effluvia or vapor, in respect to the manner in which the places or spaces within the limits of said city, where such manufactures, works, trades, or business shall be carried on or used, and whereby to preserve general health in the city, . . . . under such penalties of fines and forfeitures as shall be reasonable." See also the act of March 30, 1798 (Andrews' Laws, p. 403, as cited by Mr. Eaton); the act of April 9, 1804, and 2 Revised Laws of 1813 (p. 534, § 25); 1 Revised Statutes, 1830 (p. 441, § 3), authorizing the Mayor or Commissioners to remove or destroy anything that may be dangerous to the public health. The laws of the same character, relative to the city of New York, in 1850 (ch. 275, p. 597), contained provisions more extensive

and more rigid than those now under consideration. The amended charter of the city of Brooklyn (Laws 1854, ch. 384) gives the Common Council power to compel the owner or occupant of any slaughter-house to cleanse, remove, or abate the same, from time to time, and as often as may be necessary for the health or comfort of the inhabitants. These acts show that, from the earliest organization of the government, the absolute control over persons and property, so far as the public health was concerned, was vested in boards or officers, who exercised a summary jurisdiction over the subject, and who were not bound to wait the slow course of the law, and that juries had never been used in this class of cases. The Governor, the Mayor, health officers under various names, were the persons intrusted with the execution of this important public function; and they were always empowered to act in a summary manner. Scarcely a year passes, or did pass prior to 1846, in which the Legislature did not charter some city or village, and give to the local powers full authority, by their own action, and in their own way, to regulate, abate, or remove all trades or manufactures that might be by them deemed injurious to the public health. I have examined the statutes from 1832 onward, and find that scarcely a year passed in which these powers were not given to many cities or villages, by original authority or by amendments to their charters. I see, among the laws of the session just closed, several of the same character—among them, one to incorporate the village of Gouverneur, which gives the trustees full power to prohibit and abate nuisances, to compel the owners of a butcher's stall, sewer, privy, or other unwholesome thing, to cleanse the same, or cause the same to be removed, or otherwise disposed of, as may be necessary for the public good. (See also 15 Wend. 262.)

I do not doubt, either, that, upon general principles of law, and considering them as nuisances, the right of regulating the use of the streets by droves of cattle, and of removing houses for their slaughter from particular locations, as the public health required, was within the power of the Common Council or other local authorities, independently of the statute by which it was given (Van Wormer v. Albany, 15 Wend. 262; 3 Black.

Com. *b*). It would be difficult, then, to say that the power given by this act of 1866 was a new exercise of authority, not allowed by the Constitution, or that it was a case in which a jury trial had theretofore been had.

Before leaving the consideration of this constitutional objection it ought, perhaps, to be observed that the act provides for notice to the party affected, before the judgment finally passes against him. In substance, the Board, upon the evidence before it, determine that a prima facie case exists requiring their action. In the present instance, after such preliminary determination made, notice was given to Heister of what had been done, and that he could be heard upon the subject, with his witnesses, at a time designated. This gave the same protection to all his rights as if notice had been served upon him before any preliminary proceedings had been taken. He refuses to litigate before the Board the question whether his pursuit is dangerous to the public health, but places himself upon their want of power over the subject. He cannot complain now that their judgment upon the facts is to be held conclusive upon him.

It is further insisted that the act in question is invalid, in that it confers judicial power upon the Metropolitan Board of Health. If I understand this argument, it is this: the Constitution says (art. 6, § 18): "All judicial officers of cities and villages, and all such judicial officers as may be created therein by law, shall be elected at such times and in such manner as the Legislature may direct," and as judicial power is here given to officers who are not elected, but are appointed by the Governor and Senate, the appointment is invalid.

The same argument is drawn from the general distribution of legislative, executive, and judicial powers in the Constitution, and the provision that the Legislature may establish inferior local Courts in cities, and that they shall be uniform, except for the cities of New York and Buffalo.

These arguments are earnestly pressed, and, when the case occurs where they necessarily arise, will be carefully considered and decided. In my opinion they do not now arise.

The power to be exercised by this Board upon the subjects in question is not judicial in its character. It falls more properly

under the head of an administrative duty. It is no more judicial than the action of commissioners of highways in laying out or refusing to lay out a highway, or in determining the necessity of rebuilding a bridge in their town. It is no more judicial than is the action of commissioners of excise in the country, or of the Metropolitan Police Board, who, as Commissioners of Excise, discuss the question of whether a license shall be granted to an individual to keep an inn or to sell spirituous liquors. The qualifications of the person are scanned; the place proposed for the sale of liquors, and whether the applicant has the accommodations required by law, the public necessity or propriety of such permission to sell, are examined into and determined. But such powers have never been held to be of a judicial character. The power of the Metropolitan Board to act upon the latter subject has been distinctly sustained in this Court (Metropolitan Board *v.* Barrie, 34 N. Y. 657).

It does not affect this or any point in the case, that the Board have made these ordinances for the city of New York alone. They have full power to make them for the other parts of their district when and as the necessities of the case may require.

That the Legislature possess the entire control over the streets of the city of New York, and that it can delegate such portions of its authority to the local organizations, and in such measure, form, and under such restrictions as it thinks proper, has been frequently decided (Darlington *v.* The Mayor, 31 N. Y. 164; People *v.* Kerr, 27 id. 188).

The Judgment of the General Term in each case should be reversed, and judgment ordered for the Appellants; and in number two, judgment should be entered for the two penalties demanded in the action.

WOODRUFF, MASON, BACON, and DWIGHT, JJ., concurred.

MILLER, J., (dissenting.)—The appeals in the cases now before us, present for our consideration the constitutional validity of the act of the Legislature creating a Metropolitan Sanitary District and Board of Health, and of several provisions of said act, and of the act amending the same passed in 1866 (Sess. Laws of 1866, chaps. 74, 686). Each of the cases involves

questions of grave moment and of paramount importance to the public, and should be examined and considered with calm deliberation, and with a proper appreciation of the interests involved.

It is claimed that so far as the acts of the Legislature organizing the Metropolitan Board of Health confer power to legislate, they conflict with the Constitution, and are void. At the time when the Constitution of 1846 was adopted, the several Boards of Health in the cities and villages of this State were vested with authority, and it was made their duty "to make regulations, in their discretion, concerning . . . . the suppression and removal of nuisances, and all such other regulations as they shall think necessary and proper for the preservation of the public health" (1 R. S., 2d ed. 445, § 27). This law was in force at the time when the Constitution went into operation; and in pursuance of the powers thus conferred upon them, a code of ordinances had been passed by the Board of Health of the city of New York, which consisted of the Mayor and Common Council of that city (Sess. Laws of 1823, ch. 71; id. of 1850, ch. 275; 2 R. S., 5th ed. part 1, ch. 14), which was in operation when the new Board of Health was organized. By the acts organizing the new Board, which are now submitted to our consideration, they succeed to the powers vested in the local authorities. By the twentieth section (Sess. Laws of 1866, ch. 686), the power to make rules and regulations was conferred upon them, and they were vested with extensive legislative powers, entirely local in their character. They possess the power to create offences, and to enforce the ordinances made by them by a penalty not exceeding fifty dollars for each offence. By section thirty (Sess. Laws of 1866, ch. 74), it is declared that "Whoever shall violate any provision of this act, or any order of said Board, made under the authority of the same, or any by-law or ordinance therein referred to, or shall obstruct or interfere with any person in the execution of any order of said Board," etc., "or wilfully omit to obey any such order, shall be guilty of a misdemeanor, and be liable to be indicted and punished for such offence. It also provides that "any person, corporation, or body which may have

wilfully done or omitted any act or thing which is in this act, or any law or ordinance therein referred to, declared to be, or to subject the party guilty thereof to punishment for a misdemeanor, shall, in addition thereto, be subject to a penalty of $250."

In pursuance of the provisions of the twentieth section, above cited, a large number of rules, regulations, and ordinances have been passed, embracing a variety of subjects relating to the preservation of the public health.

At the time when the Constitution went into effect, and prior to the passage of the act in question, the Boards of Health, in their several localities, were the only bodies who enjoyed the power of local legislation in regard to the public health. They had extensive and almost unlimited powers upon this subject (1 R. S., 2d ed., ch. 14); and severe penalties were imposed for a violation of any regulation made by them (id. p. 446, § 28; Laws of 1832, ch. 333). As we have seen, the Constitution recognized the validity of these laws, and the Legislature had full power and authority to restrict these powers; but they had no right to confer them upon other and different bodies, holding their offices by State authority, and not elected by the people or appointed by the local authorities within the limits of whose jurisdiction they were authorized to exercise their functions within the provisions of section two of the tenth article of the Constitution.

By the first section of the third article of the Constitution, the legislative power is vested in the Senate and Assembly; and thus the Legislature was authorized to enact and to repeal laws in reference to the public health, without any restriction or limitation whatever. But while the Legislature can confer power, in a restricted sense, upon public bodies which the Constitution recognized, at the time of its adoption, as authorized to receive such power, there is nothing in that instrument which sanctions a transfer of such power to public officers, or to any body who hold their offices by virtue of appointment from the Governor and Senate. It cannot take away legislative authority delegated to localities, and confer it upon officers created by virtue of its own enactments. The Common Coun-

cils of cities, the trustees of villages, and the electors of towns when assembled in town-meeting, possessed and enjoyed certain powers and privileges, in this respect, when the Constitution took effect. These may be changed, modified, or repealed; but they cannot be transferred to bodies or persons not recognized by the Constitution. The Constitution confers certain legislative powers on local organizations. By article eight, section nine, it provides for the organization of cities and villages. By article three, section seventeen, it authorizes the Legislature to confer upon Boards of Supervisors certain powers of local legislation. Considering the laws as they existed when the Constitution was adopted, conferring local legislation upon Boards of Health, that instrument must be regarded as recognizing the powers thus conferred; and the absence of power to confer such authority upon new officers must, I think, be considered as a prohibition to go beyond this. As already stated, there were certain powers existing when the Constitution took effect, and certain other powers conferred directly by the Constitution. It would therefore seem to follow, by implication, that the Legislature was prohibited from granting powers of local legislation to any bodies which were not thus recognized. In The People *v.* Draper (15 N. Y. 532), Judge Denio, in discussing the question of power conferred by the Constitution, says that "Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government; the grant of legislative power itself; the organization of the executive authority; the erection of the principal Courts of Justice; create implied limitations upon the law-making authority, as strong as though a negative was expressed in each instance. But, independently of these restraints, express or implied, every subject within the scope of civil government is liable to be dealt with by the Legislature."

The provisions of the Constitution defining legislative powers are evidently intended as restraints upon the authority of the Legislature, and to prevent the exercise of such powers by conferring it upon officers neither elected by the people nor appointed by the local authorities affected. Clarke *v.* The City

of Rochester (28 N. Y. 606) holds that the Legislature cannot commit the power of enacting laws to any other body than itself, not even to the electors of the State. The learned Judge who wrote the opinion says: "While general statutes must be enacted by the Legislature, it is plain the power to make local regulations, having the force of law in limited localities, may be committed to other bodies, *representing the people in their local divisions,* or to the people of those districts themselves." It is then only to local Boards or Councils in cities, in villages, and to authorities recognized by the Constitution, that this power can be committed. No such authority is sanctioned as to any board of officers independent of these provisions, and it would be in direct conflict with the Constitution so to hold. For if such power can be transferred and granted to a board of officers of any kind, then there is no limit to legislative power, and it might upon the same principle, if not with the same propriety, be conferred upon a single individual, which could never have been intended. The same doctrine is fully endorsed and sustained in The People *v.* Acton (48 Barb. 533). This case involved the constitutionality of the twelfth section of an act of the Legislature, passed in 1867, which invested the Board of Metropolitan Police with all the powers and duties conferred by law upon the Mayor and Common Council, and all other boards and officers of the city of New York (except the Metropolitan Board of Health), in respect to the licensing of theatres, places of amusement, &c., and authorized such Board to alter, amend, modify or repeal all ordinances in force at the time of the passage of the act, concerning the persons and matters mentioned in said section. It was held in this case that the Legislature cannot confer the power to discharge duties and make regulations, to pass laws relating thereto, upon State officers, no matter how appointed, whether by the Governor and Senate or the Legislature. This case is directly in point, and the judgment of the General Term therein was affirmed upon appeal to this Court. The opinion has not been published or furnished, and, therefore, we have no means of knowing the precise grounds taken, although it is fair to assume that the Court concurred with the grounds taken in the Supreme Court.

It is said, in reference to the case of The People *v.* Acton, that, so far as it is applicable to the cases before us, it was decided upon the ground that the new power taken from the local officers of New York city was conferred on the Police Board, to be solely exercised by the latter in said city. I do not so understand that decision. Ingraham, J., in his opinion in that case, says: "The Constitution provides that the Legislature may confer upon the Board of Supervisors powers of local legislation. The granting of such a power to the Legislature naturally involves the supposition that they could not otherwise give such a power. If they could not give any such power to Boards of Supervisors without a constitutional provision, I am at a loss to see any authority to bestow such a power on a Board created by themselves, and not a recognized body in the constitution. The powers given to them are to legislate in regard to local matters." He cites Barto *v.* Himrod (4 Seld. 483) as an authority for the principal that laws could only be enacted by the legislative bodies to which the legislative power is committed by the Constitution; and remarks: "I see no good reason why the Legislature should be allowed to commit to the Board of Police the power to legislate, when they could not even submit to the people the question whether they would approve of a law." If the Legislature could not delegate such a power to the Board of Police, how could it be done to any other board of officers similarly constituted and organized? It will be perceived that the learned Judge does not place his opinion upon the ground that the powers conferred are to be solely exercised within the city, but upon the broad ground that legislative powers cannot be conferred upon a Board created by the Legislature itself, which had no existence when the Constitution was adopted, and which the Constitution did not recognize. Nor do I understand that the opinion of Justice Smith sustains any such doctrine as is claimed. But, even conceding that there may be some force in the suggestion made as to the effect of that decision, can it, in any way, aid in sustaining the constitutionality of the law in question? The order of the Board of Health, for a violation of which a penalty is claimed,

was entirely local. The ordinance claimed to have been violated, so far as it is in controversy here, was local in its operation, and related to the city of New York; and the injunction sought have reference to the local action of the Board of Health as to New York City alone. Here, then, is the exercise of legislation entirely local in its character.

The result of the examination I have bestowed upon the question discussed brings my mind to the inevitable conclusion, that the provisions of the act to which I have adverted confer legislative powers upon the Board ofHealth in violation of the Constitution. They invade the powers guaranteed by the Constitution to local authorities, and confer them upon officers who hold their offices by appointment from the Governor and the Senate, and who are not chosen by the electors of the city of New York, or appointed by any body so elected, and who do not hold from any authority which invests them with the prerogatives of local legislation.

It matters not, I think, that the Board of Health claim to act in a more extended terrritory than the city of New York. Nor does it, in my opinion, contravene the principle decided in The People *v.* Draper, to hold that legislative powers cannot be conferred; for no such powers were originally conferred upon the Police Commissioners as are contained in this act, and when the Legislature attempted to confer those of a similar character it was decided that it was unauthorized and in violation of the Constitution (People *v.* Acton, 48 Barb. 528).

An objection is taken to the fourteenth section of the act (chap. 74, Sess. Laws of 1866) upon the ground that it confers judicial powers in violation of the Constitution. The first part of the section provides that "Whenever any building, erection, excavation, premises, business pursuit, matter or thing, or the sewerage, drainge, or ventilation therof in said district shall, in the opinion of said Board," &c., "be in a condition or in effect dangerous to life or health, said Board may take and file among its records what it shall regard as sufficient proof to authorize its declaration, that the same, to the extent it may specify, is a public nuisance, or dangerous to

life or health; and said Board may thereupon enter in its records the same as a nuisance, and order the same to be removed, abated," &c. The order is to be served before execution, and the Board have power to rescind, modify, and reaffirm the order, and to direct the execution of the original, or of a new or modified order, as it may determine. By a subsequent provision of the same section, the Board, upon what it may regard as adequate proof of a violation or resistance of any order, law, or ordinance, may issue a warrant for the arrest of any offender. These provisions confer complete judicial authority and power to act and to pronounce judgment in the matter, more extensive and summary in its character than the powers enjoyed by any tribunal of justice or officer known to the law. I am inclined to think that this provision is in conflict with section eighteen of article six of the Constitution, which provides that "All judicial officers of cities and villages, and all such judicial officers as may be created therein by law, shall be elected at such times and in such manner as the Legislature may direct." By section fourteen of the same article: "Inferior local Courts of civil and criminal jurisdiction may be established by the Legislature in cities;" but under section eighteen, as we have seen, all officers of such Courts must be elected by the People.

There is no authority in the Constitution for the appointment of judical officers by the Governor, except in cases of vacancy; and all other judicial officers must be elected as the Constitution provides. As the Board of Health are appointed, I do not well see how the Legislature can confer upon them any such authority as the act provides. In Sill v. The Village of Corning (15 N. Y. 297) it was held that the Constitution has not deprived the Legislature of the power to provide for the organization of local Courts of civil and criminal Jurisdiction in villages. The question was entirely different from the one presented in this case, and the officer provided for was to be elected, which is not the case here. Conceding, then, that local Courts may be established, the officers of such Courts must be elected in accordance with the Constitution.

The provision of the act referred to does not call upon the Board to act judiciously in the discharge of certain duties which are imposed upon them, but vests them expressly with specified judicial powers, and, therefore, cannot be sustained. It is said that judicial duties may be imposed on a Board of local commissioners which are not elected by the people, or appointed, by an officer or a body elected by the people, and we are referred to two cases in support of this position.

In Commissioners of Pilots *v.* Vanderbilt (31 N. Y. 270), an action was brought for a penalty under the act to prevent encroachments and obstructions in the harbor of New York, and to authorize their removal, and it was decided that the giving of notice to remove all obstructions was in the nature of a judicial act, calling for the exercise of judgment and discretion. This is not in any way analogous to a case where power is conferred to pronounce judgment, and to issue process, the same as a regularly constituted Court, and to execute that process. In Commissioners *v.* Clark (33 N. Y. 251), no question of this nature appears to have been raised. There is no precedent in the books for the exercise of any such judicial power outside of the Courts of law recognized by the Constitution, and I think it is entirely unauthorized, and in violation of its plain provisions.

The first entitled action is brought to recover a penalty for a violation of an order of the Board, made under the first subdivision of the fourteenth section of the act, and presents the question whether the Board of Health had a right to make and enforce an order abating the business of slaughtering animals, at the Defendant's place of business, as a public nuisance, and as dangerous to life and health. The power thus exercised is in the nature of, if not entirely a judicial act. And conceding that such a power may be conferred, the act of the Board in making the order in question was, I think, in violation of the Constitution of this State, which guarantees that no person shall be deprived of his "property without due process of law" (Const. of N. Y ., art. 1, § 6). The order of the Board pronounced condemnation of the Defendant's business without any sort of a preliminary notice, and with

no opportunity to be heard and to try the question before the rendition of judgment. The Board never acquired jurisdiction over the person or the subject-matter before the condemnation was had, and a notice afterward did not remedy the difficulty, or give force or validity to their proceedings. The judgment was either valid or invalid when it was pronounced, and, unless jurisdiction was then acquired, no subsequent act can give it validty or change its real character. It is certainly an unusual, an anomalous, and a remarkable proceeding, unknown to the ordinary course of practice in judicial tribunals, to pronounce judgment in the first instance, and then to call upon a party whose property has been condemned to vindicate himself before a tribunal which is already committed, by proof that the charge made and established by their judicial action is without foundation. More especially is such a proceeding objectionable when it is tolerated and allowed without an affidavit to support the charge made, and the Board are vested with authority to act and make an adjudication upon "what it shall regard as sufficient proof." Under this act, a communication dictated by malice or rivalry might be the effective instrument of destroying the property of a citizen, and inflicting a serious injury upon his reputation. And the officers invested with such power might, under the slightest pretext, and upon a groundless accusation, be the authors of the most mischievous consequences. Clearly this is not "due process of law," for no such power is ordinarily conferred upon any Court of law.

The provision of the Constitution which has been referred to means that no person shall be deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of common law; that it may be ascertained judicialy that a person has forfeited his rights, a suit must be prosecuted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining title to property (Taylor *v.* Porter, 4 Hill 147; Westervelt *v.* Gregg, 2 Kern. 202; Wynehamer *v.* The People, 3 id. 378; Embury *v.* Conner, 3 Comst. 511; The People *v.* Toynbee, 2 Parker, 514, 515, 526). And this must be done

in the regular course of administration, through Courts of Justice (Rodgers *v.* Barker, 2 Kern. 13, 447, 454; Burch *v.* Newbury, 6 Seld. 374, 397; The People *v.* Corporation of Albany, 11 Wend. 539; Wynehamer *v.* The People, 3 Kern. 426). By the fourteenth section of the act, as we have seen, the Board of Health have authority, without notice to the party to be affected by their proceeding, by partial and hearsay evidence, to declare the property of a citizen a nuisance, dangerous to life and health; and unless afterward satisfied by the owner that the judgment is erroneous and should be reversed, to affirm and ratify the order thus made. Such a proceeding is unknown to the proceedings in any Court of Justice, and there is no power, in my opinion, to delegate to a Board of Health the right to define what shall be a nuisance, or to make acts criminal which the law holds innocent. (Mayor, &c., *v.* The Board of Health, 31 How. 395). It is no answer to views I have expressed to say that the Legislature have the power to confer upon the Board the right to do, and to make it their duty to do, what every citizen has a right to do in his own motion; for the Board seek to recover a penalty on the strength of their official action, and by virtue of the order made by them, not as individuals, or upon their responsibility as officers alone, but by virtue of an act authorized and done in pursuance of an act of the Legislature. They attempted to deprive a person of his property under the provisions of this act, and to recover a penalty because that person refused to obey an unlawful and unauthorized order. If the position is a sound one, that the Legislature have not the power to confer the authority claimed to be exercised, then this feature of the act is unconstitutional and void. And if it be void, then the adjudication made under this provision is without authority, and can be attacked collaterally as well as in a direct proceeding for that purpose. It is a jurisdictional question, and such questions are always open for consideration. This proposition is so plain that it is unnecessary to cite authorities to sustain it. It follows, that the proceedings may be reviewed without a certiorari, and that the action for a penalty in the first action cannot be maintained.

The second action, which is brought to recover penalties for violations of an ordinance of the Board, presents the question as to the validity of the ordinance; and as I have shown that the Board does not possess legislative powers, the result is inevitable that the action cannot be maintained.

In the third action which is brought against the Board, the Plaintiff asks that the Board may be enjoined from enforcing the ordinances prohibiting the driving and slaughtering of cattle, and that it be declared void. It is conceded by the case that the business of driving and slaughtering cattle impairs the enjoyment of life; that unhealthy exhalations are generated, and that a large number of physicians pronounce the business dangerous to health.

In Catlin *v.* Valentine (9 Paige, 575), it was held that to constitute a nuisance it is not necessary that a noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces what is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. (See also Brady *v.* Weeks, 3 Barb. 157). The Plaintiff virtually admits that his business is a nuisance, and asks the Court to interfere to prevent its abatement. When the question of the existence of a nuisance is in doubt, the Court will grant an order restraining the Board of Health from abating it. (See Rogers *v.* Barker, 31 Barb. 447; Mayor *v.* Board of Health, 31 How. 385; Shuster's case, not reported). But where it is entirely clear that a nuisance does exist, an injunction should not issue. In this case, however, it is apparent that the ordinance is void, because the Legislature cannot delegate to the Board the power to legislate, and the judgment should be to that effect, but without an injunction.

In the fourth case, the question arises whether an injunction should issue to restrain the Defendants from enforcing the order made by them, declaring the business and premises of the Plaintiff a nuisance. If I am correct in holding that the order was made without lawful authority, and is void for that reason, then the proceedings are null and void, and the Plaintiff is entitled to the relief demanded. As I have alread stated,

the question is one of a jurisdictional character, and the party affected by the order is not confined to the remedy of a certiorari to test the validity of the order made.

Several other questions are presented, but as those already discussed dispose of the cases, it is not necessary to examine them. Upon the grounds already stated, I am of opinion that the judgment of the Court below should be affirmed in all except the third case. in which it should be modified in accordance with the views here expressed.

GROVER and CLERKE, JJ., concurred.

Judgment of General Term reversed in each case and judgment ordered for the Appellants, with costs, and, in the case of number two, for the two penalties claimed.

JOEL TIFFANY,
State Reporter.

---

## JAMES R. WHITING, RESPONDENT, *v.* THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, APPELLANTS.

*Complaint—Demurrer—Proper Parties—Leave to Plead.*

When a pleading is sustained—the demurrer being overruled—and leave is given to answer the pleading, the demurrant is put to his election to answer over or submit to judgment, and if he submit to judgment it is final.

On an appeal from such judgment to this Court the appeal comes here on the question of affirmance or reversal only, and no leave to plead anew can be given.

*Wright & Cornell* for the Respondent.

*R. O'Gorman* for the Appellants.

GROVER, J.—No question was raised in this Court but that the Court of Common Pleas of the city of New York had jurisdiction of the action. The real estate affected is situ-

*Demurrer—Leave to plead over.* 107 *N. Y.* 83 (11 *St. Rep.* 375; 27 *Week. Dig.* 301); 3 *Hun,* 701; 39 *Misc.* 219 (79 *N. Y. Supp.* 394; 12 *Ann. Cas.* 156); 9 *Daly,* 145.

ated in the city of New York, and the Court of Common Pleas has concurrent jurisdiction with the Supreme Court.

The complaint alleges that Worth street is situated south of Sixty-third street, and that the Street Commissioner did not, before the proceedings taken by the Common Council to change the grade of said street, cause the notice to be published as required by the second section of the act entitled "An Act to make permanent the Grades of the Streets and Avenues of the City of New York" (Laws 1852, page 46), and that the consent of the owners of two-thirds of the land, in lineal feet, to such change of grade was not procured, as required by said section.

These averments (if true) show that if Worth street is one of the streets having an established grade within the act in question, the Common Counsil had no power to make an order changing such grade, and that all its acts for that purpose were void.

The language of the section (2) is, that "Whenever an application shall be made to said Common Council to change or alter the grade of any street or avenue in said city, already established south of Sixty-third street, or which may hereafter be established north of Sixty-second street, in whole or in part," &c.; and in another clause of the same section the language is precisely the same, thus clearly placing the grades south upon a different basis from those north of Sixty-third street—making the grades of all the former, as already established, not subject to change by the Common Council, except by complying with the requirements of the act, while the latter might be determined and established by the Common Council without such compliance, and when so established they were placed upon the same footing as the former as to subsequent changes.

It follows that the complaint shows that Worth street had an established grade, and that the ordinance providing for a change is a mere nullity. The complaint further avers that the execution of the ordinance providing for the change will produce a great and irreparable injury to the Plaintiff.

The demurrer admits this. If the fact be so, there being no question as to Plaintiff's title to the land and buildings claimed by him, the case is clearly within the jurisdiction of equity to prevent this injury.

It comes directly within the principle upon which the Albany Northern Railroad Company *v.* Brownell (24 N. Y. 345) was decided. It is not a case where the Common Council had the right to make the change, but in attempting to make it have committed such irregularities as to make the proceedings void, but have the right to begin de novo and make the change valid.

In such cases equity will not interfere, but leave the parties to their legal remedies. In this case they cannot make the change at all without the assent of the owners of two-thirds of the land, computed by lineal feet upon the street. This consent may never be given, and, consequently, the Common Council may never acquire the power to act.

Equity, uniformly, when it has jurisdiction of the case, gives, if any, a complete remedy, and does not send its suitors to a Court of Law for a part of the redress to which the case entitles them. It was upon this principle that the damages already sustained by the Plaintiff from the prosecution of the work were awarded to him, in addition to an injunction restraining its further prosecution. The complaint alleges that the Defendants are prosecuting the work. The demurrer admits it. They are therefore properly made Defendants.

It is insisted that the Defendants are only prosecuting the work through the officers of the city, and if their acts are void in directing the officers to proceed with it, the latter only are liable. The answer to this position is, that the Defendants, by giving the directions to the officers to make the change, have committed a wrong against the rights of the Plaintiff, and that municipal, like other corporations, are answerable for wrongs.

The judgment appealed from must be affirmed, with costs.

Affirmed.

JOEL TIFFANY,
State Reporter.

## LYDIA NEWKIRK, ADMINISTRATOR, APPELLANT, v. THE NEW YORK AND HARLEM RAILROAD COMPANY, RESPONDENTS.

*Contract—Parol Evidence—Nonsuit.*

THIS was an action commenced by the Plaintiff's intestate, and continued in her name, to recover four month's salary, alleged to have been due the intestate for services as travelling agent for the Defendants. On the first day of October, 1860, the President of the Defendants wrote to the intestate the following letter:

"NEW YORK AND HARLEM RAILROAD COMPANY,
"PRESIDENT'S OFFICE, NEW YORK, OCT. 1, 1860.
"FRANCIS NEWKIRK, Esq.:

"SIR—You are hereby appointed general travelling agent for this company, to take charge, in that capacity, of its interests north and west of Albany. Your duties will be mainly confined to passenger business, but you are also expected, as far as possible, to attend to the freight business. Your compensation will be $100 a month, and your travelling expenses; the account to be settled monthly. You are expected to devote your whole time to these duties. A new business is to be built up, and all you can do to forward the interests of the company will be duly appreciated. . . . .

"Yours, &c.,
"ALLEN CAMPBELL, President."

Some evidence had been taken in the case of oral negotiations and agreements between the intestate and Mr. Campbell, preceding the writing of this letter. But after the letter was proved, all such evidence was stricken out, on motion of the Defendants, and without objection on the part of the Plaintiff.

The proof showed that the intestate was employed in soliciting passengers for certain express trains put on the Defendant's road on the first day of October, 1860, and that these trains were taken off in May, 1861. The intestate was paid $100 a month and expenses from October, 1860, to May, 1861, inclusive, and was paid at the end of each month, except in two instances, when his bills covered two months each. The intestate himself testified that the President sent him West in May, 1861, to stop advertising for summer business, and to collect in the bills for printing, &c., and bring them to New York. That he did so, and returned to New York before the first of June; that the trains were then discontinued, and the business connected with them. He then settled up to the first of June, and made no further claim; did not claim to be hired for a year; went home without instructions; did no more work for the company; presented no bill and had no further connection with the Defendants bill on or after the first of October, 1861, when he presented his bill for the four months' service from June first to October first, payment of which was refused, on the ground that he had not been employed during that time.

The Judge at the Circuit dismissed the complaint, and the Defendants had judgment, which was affirmed at the General Term, and the Plaintiff appeals to this Court.

*L. Tremaine* for Appellant.
*J. H. Reynolds* for Respondents.

DWIGHT, J.—Evidence of a parol contract was properly stricken out after the production of the letter of employment, especially as there was no objection on the part of the Plaintiff, and the acts of the intestate were entirely consistent with the contract shown by the letter, viz.: a contract for employment and wages by the month. He stopped work before the first of June; was paid up to that day; went home; gave no intimation that he considered himself in the employ of the company, but acted in every respect as if he considered his

employment to have ceased on the first of June. I do not think there was any question in the case for the jury to pass upon. The only exceptions of the Appellant are to the refusal of the Court to submit the case to the jury, and its discision to dismiss the complaint, both of which rulings were clearly right.

The judgment at the Circuit, and of the General Term, should be affirmed.

All affirm.

Affirmed.

JOEL TIFFANY,
State Reporter.

## JAMES CASSIN, RESPONDENT, v. LAWRENCE DELANY AND ANN A. DELANY, APPELLANTS..

*Husband and Wife—Malicious Prosecution—Personal Liability of Wife.*

In a malicious prosecution instituted by the husband and wife, the wife will not be personally liable, if she acted in the matter only by the direction and in the presence of her husband.

In an action against husband and wife for a malicious prosecution, it is competent to prove by the husband that the wife acted by his direction, and in his presence only, in the matter.

THE Appellants are husband and wife. On the 21st day of November, 1855, Delany and wife procured the arrest of the Respondent, upon a charge of embezzlement, preferred before Matthew T. Brennan, Esq., then one of the Police Justices of the city of New York. Upon this charge Cassin entered into a recognizance for his appearance at the next Court of General Sessions to be held in the city and county of New York. Delany and wife preferred their complaint before the Grand Jury at such Court, when the bill was dismissed. Cassin brought this action in the New York Court of Common Pleas, in 1856, claiming damages in the sum of $10,000 for malicious prosecution and false imprisonment. The action was tried before a referee, who awarded one thousand dollars as damages to the Respondent. From the judgment entered upon the referee's report an appeal was taken by the Defendants to the General Term of Court of Common Pleas, when the judgment was deemed excessive, and a reversal was ordered, unless the Respondent would stipulate to reduce the recovery to the sum of $250, which stipulation was

*Damages—Reduction by Appellate Court.* 69 *N. Y.* 470; 8 *Hun,* 289; 32 *Hun,* 352; 11 *Hun,* 435; 11 *App. Div.* 564 (42 *N. Y. Supp.* 595); 63 *Barb.* 268; 14 *Daly,* 410 (14 *St. Rep.* 712; 27 *Week. Dig.* 570).

*Husband and wife—Liability of wife.* 82 *N. Y.* 233; 1 *Lans.* 298.

accordingly given, and the judgment was affirmed. From this judgment an appeal is taken to this Court by the Defendants.

*Gilbert Dean* for Appellants.
*E. W. Dodge* for Respondent.

HUNT, CH.J.—The questions in this case are these:

1. Where a prosecution is maliciously instituted by a husband and wife, the latter acting in the presence and by the direction of the husband, is she personally liable for damages in such action?

2. Is it competent to show, in such case, for the purpose of rendering her liable, that, in fact, the wife acted of her own motive and not sub potestate viri?

3. If competent, was there evidence of such independent action in the present case?

4. Had the General Term power, when they decided the amount found by the referee to be excessive, to order a reduction of the verdict to a sum named by them, as the alternative of a new trial, or was it their duty to have ordered such new trial, to the end that another jury might ascertain the amount of damages?

The following authorities furnish an answer to the first two questions: 1 Hale's P. C. 45 to 49; 4 Black. Com. 29; 2 Kent's Com. 150.

The authorities are clear that, when a tort or a felony of any inferior degree is committed by the wife, in the presence and by the direction of her husband, she is not personally liable. To exempt her from liability, both of these concurrent circumstances must exist—to wit: the presence and the command of her husband. An offence by his direction, but not in his presence, does not exempt her from liability, nor does his presence, if unaccompanied by his direction. His presence furnishes evidence, and affords a presumption of his direction, but is not conclusive, and the truth may be established by competent evidence.

In the present case the Plaintiff furnished evidence, which was held by the referee, and by the General Term, to justify the finding, that the wife acted upon her own motive, and although in his presence, was not sub potestate viri.

Assuming this to be so, the Defendants claim that they were not allowed to introduce evidence offered by them of the same character. The Defendant, Lawrence Delany, being under examination, was asked by the Defendant's counsel this question: "By whose direction, if any one, did she make that charge?" This was objected to by the Plaintiff's counsel, and rejected by the referee, to which the Defendants excepted. The Defendant might have answered, that it was by his direction, and under his authority, and this would have been evidence to discharge the wife from liability. The same question was subsequently put to the Defendant, Ann Delany, without objection, and she answered that she made by direction of her husband. The referee, however, did not credit the witness, and found against her on this point. The exclusion of this evidence of the husband, which might have sustained that of the wife, and seriously have influencel the decision of the referee, was an error, for which the judgment must be reversed, and a new trial ordered.

I cannot concur with the action of the General Term in deciding that the amount of damages found by the referee was excessive, and assuming themselves to fix what would be a suitable amount to have been found by him. Excessiveness of damages is a well-settled ground for reversing a judgment (12 Barb. 492; 19 Barb. 462; 3 Sand. S. C. R. 19). Where the Court reach the legal conclusion, that an error in that respect has been committed, it is their duty to reverse the judgment, equally as if fraud or corruption had been established, or incompetent evidence had been introduced. There is no rule or provision of law by which Judges at the General Term are authorized to fix the amount of damages properly to be recovered by a person who has suffered from the malicious prosecution of another. Such a proceeding is in hostility to

any principle of the common law, as well as to our own system of practice and pleadings. If the Court has erred in its decisions, or the jury has erred in its judgment, the matter must be referred to another jury, and this judgment, under better instructions, will give the correct response.

The General Term say that the damages awarded are excessive, that the referee has evidently blended the damages arising from a former malicious proceeding, by Lawrence Delany alone, with those incurred in which his wife was a party, and order a reversal of the judgment, unless the Plaintiff will reduce his damages to the sum of two hundred and fifty dollars. How can the Court, by any legal process of reasoning, ascertain that just seven hundred and fifty dollars was allowed by the referee for the first malicious proceeding? They say that that proceeding "really constituted the only serious injury sustained by the Plaintiff at the hands of the Defendants, either jointly or individually," and they therefore order a deduction of seven hundred and fifty dollars. Why not order a deduction of nine hundred and fifty dollars? That, in my judgment, would have been a more appropriate deduction, upon the case as understood by the Court below. But I do not see how any Judge of this Court, or of the New York Common Pleas, is entitled to pass judgment upon this question.It is exclusively for the jury, or for a referee, who, by the consent of the parties, stands in place of, and exercises the same duties, as a jury. In cases where specific items are presented on contract, and can be passed upon, rejecting or sustaining the specific charge, this Court, and the Court below, have been in the habit of directing a reversal or affirmance, subject to the condition that the party shall take their direction upon the questionable item. This I have no doubt is sound practice.

It has never, however, been applied to cases where discretion on the part of the jury was allowed, or where the damages were for a tortious act of the party, or its consequences.

Such was the holding of this Court in Moffett *v.* Sackett (18 N. Y. R. 522).

Judgment should be reversed, and a new trial ordered.

All concur.

Reversed.

JOEL TIFFANY,
State Reporter.

---

FREDERICK O. RICHTMYER, ASSIGNEE, &C., RESPONDENT, *v.* GEORGE REMSEN, SHERIFF, &C., APPELLANT.

*Escape—Defences—Allegations of Answer—Trover and Conversion—Judgment—Execution against the Person.*

In an action brought against a Sheriff for an escape, the Defendant, to avail himself of the defence that the prisoner escaping was recaptured before suit brought, must set it up in his answer.

So also, that he was prevented from recapturing the prisoner through the fraud of the Plaintiff.

It seems, that on a judgment in an action for the wrongful conversion of personal property, the Plaintiff is entitled to an execution against the body of the Defendant.

ACTION to recover of the Defendant, Sheriff of Kings county, the amount of an execution against one Searle, issued out of the Supreme Court against the body of the judgment-debtor, and delivered to the Defendant for collection.

The Defendant arrested Searle, and duly admitted him to the liberties of the jail of Kings county. Searle, after being so admitted, escaped therefrom to the city of New York, and while so absent therefrom this action was commenced.

The Defendant, in his answer, alleged that he had admitted

---

*Pleadings—Amendment—Discretion.* 60 *N. Y.* 143; 78 *N. Y.* 78; 13 *Abb. N. S.* 321 (44 *How. Pr.* 296; 35 *Super. Ct.* 127); 14 *Abb. N. S.* 404; 12 *Daly,* 379; 5 *St. Rep.* 149 (12 *Civ. Proc.* 64; 25 *Week. Dig.* 63).

*Pleading—Defences—Proof under general issue.* 25 *Hun,* 264; (62 *How. Pr.* 458); 44 *How. Pr.* 200.

Searle to the liberties of the jail, and that Searle, after his escape therefrom, voluntarily returned thereto before the commencement of the action. At the close of the Plaintiff's case, the Defendant moved for a nonsuit upon the grounds—1st. That the judgment-roll failed to show that the execution against the body of Searle was authorized.

2d. That it appeared from the evidence that Searle was detained off from the limits by the fraud and connivance of the Plaintiff.

The motion was denied, and the Defendant's counsel excepted. The Defendant's counsel then offered to prove that Searle would have returned to the jail limits before the commencement of the action, had he not been prevented from so doing by the fraudulent acts of the Plaintiff's agents.

This evidence was objected to, and rejected, upon the ground that no such defence was set up in the answer; and the Defendant's counsel excepted.

The Defendant's counsel moved to amend the answer, by alleging the above facts.

The motion was denied, and the Defendant excepted. The Defendant's counsel excepted generally to the charge to the jury. The jury found a verdict for the Plaintiff; and the exceptions were ordered to be first heard at the General Term. The exceptions were heard, and judgment for the Plaintiff was ordered upon the verdict, from which judgment the Defendant appealed to this Court.

*D. K. Abney* for Respondent.
*A. N. Weller* for Appellant.

GROVER, J.—The judgment-record in the action of the Plaintiff against Searle showed that one Johnson had a cause of action against the former for the conversion of personal property; that Johnson assigned such cause of action to the Plaintiff, who commenced the action thereon, as assignee, against Searle, and recovered the judgment upon which the execution was issued.

The ground of the objection to the record was, that the cause of action was not assignable. There are two answers to this: First, the objection, if available, could only be taken in the action against Searle. The recovery of the judgment in that case is conclusive upon the right of the Plaintiff thereto upon the parties in this action. Second, the cause of action therein was assignable, and the assignee could maintain an action therein in his own name (Haight *v.* Hoyt, 19 N. Y. 464).

A recovery of judgment for the conversion of personal property authorizes an execution against the person of the Defendant (Wesson *v.* Chamberlain, 3 N. Y. 331). The only remaining question in this case is, whether the defence, that Searle would have returned to and upon the liberties of the jail before the commencement of the action had he not been prevented by the fraud of the Plaintiff, was admissible under the answer, no such ground of defence having been alleged therein.

The escape in the present case was negligent. In such cases recaption before suit brought is a defence, and if such recaption is prevented by the fraud of the Plaintiff or his agents, that also would establish a defence to the action. A voluntary return of the debtor into custody before the suit brought is equivalent to and constitutes a recaption by the Sheriff. There is no dispute as to these rules of law.

The question is whether these grounds of defence must be set up in the answer.

The Code (§ 149) provides that the answer must contain—1st. A general or specific denial of each material allegation of the complaint controverted by the Defendant, &c.; 2d. A statement of any new matter constituting a defence, &c. The question then is, whether the defence offered consisted of new matter, or whether it merely disproved any of the material allegations of the complaint.

All that the Plaintiff must allege and approve, to maintain his action, is the recovery of the judgment, the issue and de-

livery of the execution to the Sheriff, the caption of the debtor by the Sheriff upon the execution, and the escape from custody before suit brought against the Sheriff therefor.

We have seen that the Sheriff may defend the action by proving a recaption of the Defendant before suit brought, or facts legally excusing him from making such recaption.

Proof of such facts does not controvert any allegation of the complaint. It is, therefore, new matter, constituting a defence to the action, and, under the Code, is inadmissible, unless set up in the answer.

The Court therefore correctly held that the proof offered was inadmissible under the answer.

The motion of the Defendant, made upon the trial, for leave to amend the answer, was addressed to the discretion of the Court, and its exercise cannot be reversed by this Court. The answer does not contain a general denial, and therefore the question does not arise, whether the provisions of the Revised Statutes authorizing public officers, under the plea of the general issue, to give any defence in evidence, is repealed by the Code.

There was no legal error committed in excluding the defence in this case.

The judgment must be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

JOHN C. WINNE ET AL., SURVIVORS APPELLANTS, v. FRANCIS MACDONALD ET AL., RESPONDENTS.

*Contract—Vendor—Divisibility—Fraud—Bona-fide Purchaser—Delivery.*

A party who has acquired possession of property by means, as between him and his vendor, which would render his title invalid, may, nevertheless, impart a good title to a bonâ fide purchaser from him.

A contract for the delivery of two cargoes of wheat, although entire in form, may be divisible at the option of the parties; and when they have treated it as divisible, in requiring payment when one cargo has been delivered, &c., it will be deemed to be divisible.

ON the 21st of October, 1856, A. F. De Luze, a produce broker sold for the Plaintiffs to Theodore Perry, through his broker, J. W. Spencer, 3,921 bushels of Western Red Wheat, then on canal-boat D. Hibbard, and also 3,500 bushels of similar wheat, then on canal-boat Ural, at $1.54 per 60 pounds, to be delivered to vessel in good shipping condition, quality as per sample, cash.

At the time of the sale De Luze was informed by Spencer that the wheat was to be sent on board the ship Compromise, then lying at Pier 14, East River, and the Plaintiffs were directed to send the wheat there. The Compromise was bound for Glasgow.

The Ural, containing the wheat in question, was first sent alongside of the Compromise. The wheat was in bulk, not in bags. A measurer was employed, as usual, to measure the wheat on its transfer from the canal-boat to the ship.

By the practice then prevailing it was the duty of the purchaser to select one of the Board of Measurers to measure the grain, whose duty it was, when the measurement was completed, to send to the seller his return in duplicate; the one being called a whole and the other a half return—the only difference between them being, that in the latter one-half of

*Remarks by Judge.* 86 *App. Div.* 373 (83 *N. Y. Supp.* 811).

*Fraud—Bona fide purchaser—Delivery.* 58 *N. Y.* 78; 84 *N. Y.* 205; 87 *N. Y.* 33; 38 *Super. Ct.* 385.

the measurer's charge for measuring and screening is stated,

which the purchaser was to refund to the seller when paying for the wheat, the seller paying the whole charge, in the first instance, to the measurer.

The discharging and measuring of this boat-load of wheat from the Ural was completed on the 22d of October; and on the afternoon of that day, or on the morning of the 23d of October, the whole and half returns were sent by the measurer to the Plaintiffs.

On the morning of the 23d, the Plaintiffs sent the half return to Perry, with a bill of parcels for this canal-boat load, amounting to $5,400.29. This was done without any request or solicitation on the part of Perry. It was testified that, by the usage and custom of the grain trade in the city of New York in October, 1856, upon sales of wheat in bulk, delivered on board of ships, the vendor was considered as having completed a delivery when the measurer's half return had been sent by him, with a bill of parcels, to the vendee, the possession of the half return giving to the vendee the control of the wheat, and entitling him to a bill of lading from the ship.

On the same day—the 23d—Sheldon met Perry on the Corn Exchange, and requested a check for the amount of the bill of parcels of this boat-load of wheat. Perry replied he would pay on Saturday; to which Sheldon made no objection. No mention was made at the time about the other canal-boat load of wheat, the return of which had not then been received from the measurer, nor did Sheldon then know whether or not this other boat-load would be on board the ship by or before Saturday.

Prior to the 23d of October, 1856, the Defendants, who were commission merchants in the city of New York, largely engaged in the business of advancing on grain and other produce consigned for sale to their houses in Liverpool and Glasgow, had been doing this business with Perry. On the morning of that day Perry came to the Defendant's office and asked James Hutchison, who was a clerk of the Defendants, and entrusted with the business of making advances on grain on their behalf, to give him $5,000, which Hutchison declined doing. Perry then told Hutchison he wanted in on account

of the Compromise, stating that there was one boat-load of wheat on board, and that he wanted an advance on that of $5,000. The money was, upon this statement, given to Perry. Perry had previously told Hutchison that he was going to ship about 7,000 bushels of wheat by the Compromise, and this money was given to Perry, as he testified, as an advance on the wheat in question.

It was the practice of the Defendants to send for and get the measurer's return from Perry for produce which they had advanced upon, whenever they wanted to obtain the bills of lading, which they generally did not require until the day before the sailing of the steamer, unless Defendants had negotiated their exchange, in which case they wanted them sooner. At the time of making this advance neither Hutchison nor MacDonald had any knowledge of any difficulty in Perry's affairs.

On the morning the 24th of October, the Defendants sent to Perry for the measurer's return for the wheat above mentioned, and having received the same, the Defendants, on the same day, obtained a bill of lading in their own name for the said wheat, from the master of the ship Compromise, upon the production and delivery to him of the measurer's return.

The Defendants, at this time, had no notice of the Plaintiffs' claim, nor had any demand been made upon them, or on the ship-owners, for the wheat.

At the time of the sale of the wheat in question, and of the delivery of the measurer's return to the Defendants, Perry's credit stood well in the market; and, although his notes laid over at three o'clock on the 23d of October, the evidence of Perry will authorize the inference that his failure was not premeditated, and that he was compelled to suspend payment by reason of unforseen necessities. At the trial the presiding Judge, among other things, charged the jury, that if the Plaintiffs delivered a part of the wheat, and asked for payment, and acquiesced in a delay of such payment until the following Satur-

day, and in Perry's detention of the measurer's return and bill of parcels, with the view of giving, and consenting to give Perry credit, irrespective of the question whether the other grain was or could be delivered or not, and if the measurer's return, which enabled the Defendants to get the bill of lading, was delivered, so as to give Perry the control of the wheat, with the intent to give him such control, or if there was a consent to delay payment until the following Saturday, irrespective of the question whether the other grain could then be completely delivered or not, then there was an absolute and unqualified delivery of the wheat, unless the purchase and delivery were procured by Perry through fraud; but if the Plaintiffs, in putting the grain on ship board, only meant to follow Perry's instructions, placing the grain on the ship designated by him as the place of delivery, but without any intent to give him control over it, and intending to require payment of the price, according to the contract, then, although they sent the measurer's return to Perry's office, they had the right to reclaim, if he did not pay when all the grain was delivered; and in that case the delivery was conditional.

The question of fraud on the part of Perry in making the purchase was submitted to the jury upon the evidence, and they were instructed that, if the purchase and delivery were made and procured by fraud, Perry would not be entitled to retain the property against the Plaintiffs. The jury were further instructed, that if they should be of opinion that the purchase was fraudulently made or the delivery conditional, yet if the advance of the Defendants was made on the security of the wheat, and it was at the time of the advance pledged as security for the repayment of the money, so far as that result could be effected by a clear understanding between the parties, that the Defendants should have control of the wheat thus offered, and should have a delivery of the measurer's return and bill of lading, and that understanding was carried into effect the next morning, by the delivery of the measurer's return, and the procurement of the bill of lading, then the Defendants' right of possession was valid, provided the advance was made in good faith, in the belief that Perry was the owner.

Exceptions were duly taken by the Plaintiffs' counsel to the several rulings, and refusals to rule, on the trial. The jury returned a verdict for the Defendants, on which judgment was duly entered, and affirmed on appeal to the General Term of the Supreme Court, and from this judgment the Plaintiffs have appealed to this Court.

*J. Larocque* for Appellants.
*H. Nicoll* for Respondents.

BACON, J.—This case has been twice before the Superior Court upon appeal from judgments rendered at Special Term. On the first trial the jury found for the Plaintiffs, upon a charge to which exceptions were taken by the Defendants, and on appeal the verdict was set aside, and a new trial granted. Upon this occasion an opinion was given by the General Term, which is reported under the name of Durbrow *v.* McDonald, in 5 Bos. 130. On examining the statement of facts in that case, and comparing them with the evidence as it appears upon the case as now presented, there is no appreciable difference between them, with, perhaps, one exception.

It seems to have been assumed by the Court, in its opinion, although the point is not very clearly stated, that the measurer's return in respect to the cargo of the boat Ural, was received by the Defendants before they made the advance of $5,000 to Perry upon the wheat in question. It now appears that this return was not, in point of fact, delivered to the Defendants until the morning of the 24th, the day after the advance was made. It is shown that it was sent to the office of Perry on the 23d, but at what particular hour does not appear, except that the son states that it was in the morning, nor that Perry had actually seen it before he made the application to the Defendants for the advance.

This is deemed a very significant circumstance by the counsel for the Plaintiffs; but in view of the questions upon which this case ultimately turns, I do not deem it of any special materiality.

In the opinion rendered after the first trial by the Court, it

is held, that upon the uncontradicted facts of the contract for the purchase of the wheat, the delivery of the cargo of the Ural on board the Compromise, the sending of the measurer's return to the purchaser, the request of the latter, that the vendors would wait for payment until Saturday, unobjected to; assuming that there was no fraud in obtaining the delivery, the Defendants in this case having, in good faith, made an advance on the security of the wheat, and on the faith of Perry being the owner, could obtain a valid title thereto, as against the original vendor, to the extent of their advance, although the buyer should fail after such advance, and be unable to fulfill his contract to pay the purchase price; that the delivery being all the delivery the contract required, or the parties contemplated, it was subject to no condition, unless it be an implied one that payment should be made when all the wheat was delivered.

It was further held, that where an advance was made to the buyer, upon the understanding, at the time, of both parties, that it was made on the security of the wheat, and the person advancing should thereupon have the control of it, and a bill of lading furnished, and such bill is immediately thereafter issued and delivered, the party thus advancing has, from that time, the right of possession and control as against the seller.

In the light of this opinion, and guided by its general principles, the case was brought to trial the second time. The proof was substantially the same, and the same questions presented themselves, with one exception. The point that the purchase of the wheat by Perry was fraudulent, does not, on the first trial, seem to have been made; at any rate, the charge of the Judge at that trial was, that there was not sufficient evidence in the case to raise the question that such purchase was fraudulent; and this passed without exception or comment. On the last trial considerable evidence was given, bearing on that subject, and the question was distinctly presented to the jury by the presiding Judge.

There are three aspects which the case presented, and which

it became the duty of the Court to bring to the consideration of the jury:

1. Whether Perry was guilty of fraud in the purchase of the wheat, and, therefore, the possession, as between him and the Plaintiff, was malâ fide, and the property was susceptible of reclamation, if it had been retained in his hands. 2. If obtained without fraud, and the delivery had been made with a waiver of payment, and with intent to give Perry control of it, whether the transaction could be impeached between those parties, and if so, whether the title of the Defendants was not entirely unassailable. 3. Assuming that Perry's purchase was fraudulent, or that the delivery was conditional, yet, if the Defendants advanced their money upon the wheat in good faith, believing it to be Perry's property, and it was delivered to them as security, they were not entitled to hold it.

The charge is given at length in the case, and is elaborate with care and discrimination, and, in my judgment, it covers every aspect the case presents, and every proposition of law the evidence is calculated to raise.

On the subject of Perry's acquisition of the property, the jury were told, that, if the purchase and delivery were produced by fraud, then Perry could not be entitled to retain the wheat as against the Plaintiffs.

This question was distinctly submitted to the jury upon the evidence, and that evidence was briefly recapitulated. It stood almost wholly upon the testimony of Perry himself, who was subjected to a lengthy and searching cross-examination.

It is made a matter of complaint that it was so presented that but one result could be anticipated.

But it surely is not the subject of exception, and should not be of complaint, if a witness commends himself to the Court by the apparent candor and fairness of his testimony, that a comment upon his evidence to that effect should be indulged from the bench. There is no rule of practice or propriety that forbids a Judge from stating the impression which testimony, either as to its subject-matter or the matter of its delivery, makes upon his mind; leaving it, however, to the jury, as it was in this case, to come to their own conclusions.

There can be little room to question that the jury did reach the conclusion that Perry was guilty of no fraud in making the purchase, although, if they had come to an opposite result on this question, it would not have established the right of the Plaintiffs to recover, since it is a well-established rule that a party who has acquired possession of property by means which, as between him and his immediate vendor, would render his title invalid, he may, nevertheless, impart a good title to a bonâ fide purchaser from him (Mowrey *v.* Walsh, 8 Cow. 238; Root *v.* French, 13 Wend. 570).

If, now, we lay the question of fraud, as I think we well may, out of the same case, assuming that the jury found there was no fraud in the purchase, it is important to consider what the transaction was between the Plaintiffs and Perry, touching the delivery of the wheat, and how far his transfer to the Defendants was valid, and their title can be upheld. It is insisted, on the part of the Plaintiffs, that the contract for the purchase of the wheat was an entire contract for the delivery of both loads, and under it the Plaintiffs could not require payment for either load until both were delivered.

This is undoubtedly true, and so the Court instructed the jury; but it is equally true that, although entire in form, it was divisible at the election of the Plaintiffs, the purchasers also assenting thereto.

The demand of payment by the Plaintiffs of Perry for the cargo of the Ural, and the sending of the measurer's return, assumed a complete delivery of that cargo, which was full and entire, and not in any respect dependent upon the delivery of the cargo of the other boat. On this demand Perry acceded, and requested only credit for the payment until Saturday, which was unobjected to on the part of the Plaintiffs. This view was clearly presented to the jury by the presiding Judge. He told them the Plaintiffs could deliver a part, and ask for payment, and if they did so, and, when the request for delay of payment until Saturday was made by Perry, they acquiesced and allowed him to retain the measurer's return, with a view of giving and consenting to give him a credit as asked, irrespective of the question whether the other cargo was then delivered or not,

then it was an absolute and unqualified delivery to Perry, which vested in him the title, so that he could pledge this wheat as security to the Defendants.

In another part of the charge, when referring to this proposition, he told the jury that if, upon the other hand, the Plaintiffs only meant to follow the instructions of Perry, placing the wheat on the ship designated as the place of delivery, but without any intent to give him control over it, and intending and expecting to require payment of the price according to the terms of the bill of sale, which were "payment cash," then, although they sent the measurer's return to the office, they had a right, as against Perry, to reclaim the grain, if he did not pay according to the terms of the bargain when the whole of the grain was delivered.

No proposition more broad than this could have been asked by the Plaintiffs. It conceded all they had the right to demand as competent or possible for the jury to find from the evidence; and the two propositions together covered the whole case. It cannot be denied that there was evidence sufficient to justify the submission to the jury of the question whether the Plaintiffs consented to give Perry a credit for the boat-load of wheat, then delivered, until Saturday, and that Perry then agreed to pay for it, irrespective of the delivery of the other boat-load. The delivery of the cargo of the Ural was entire and complete, insomuch that, I think, it cannot be doubted that if the vessel and cargo had been destroyed by fire intermediate to the delivery and the day to which the credit was extended, the loss would have been Perry's, and not the Plaintiffs'.

The whole proposition was, in my judgment, entirely sound in law, and gave the case, in this aspect of it, to the jury with perfect fairness to both sides. A finding of the jury in favor of the Defendants under such an instruction, is necessarily decisive of the whole case.

If the delivery was, in the judgment of the jury, as derived from the evidence, absolute and unqualified, and vested the title in Perry, he could, of course, make any transfer he pleased.

If the Plaintiffs had no remedy against him, they could have none against his transferees. The verdict of the jury in re-

sponse to these propositions is, therefore, a determination of the case in favor of the Defendants.

If I am right in this conclusion, the further inquiry as to the character of the transaction between Perry and the Defendants, by which the latter acquired their interest in the wheat, would seem to be superseded. But if this should not be deemed entirely clear, there remains to be considered the third aspect of which the case is susceptible, and which was also presented to the jury.

This involves the instruction given by the Judge to the jury to enable them to determine whether the Defendants were bona fide holders of the wheat as against the Plaintiffs. The instructions on this point were given in response to the claim of the Plaintiffs' counsel, that there was no delivery of the wheat, as security for advances made at the time; that the advance was made before the property was transferred; that obtaining possession of the measurer's return and bill of lading was an attempt to secure a pre-existing debt, and, therefore, if the purchase was fraudulently made, or the delivery conditional, the Plaintiffs were entitled to recover the grain. The answer to this claim was given in the language of the decision of the Supreme Court, when the new trial was ordered, and, in a condensed form, it was this: that if the advance was made upon the security of the wheat, and the wheat at the time was pledged as security for the money, so far as that could be effected by a clear understanding that the Defendants should have the control of the wheat, and that they should have the measurer's return and a bill of lading, and this understanding was carried out the next morning by the delivery of the measurer's return and the procurement of the bill of lading, then the right of possession of the Defendants was valid against the Plaintiffs, provided their advance was made in good faith, and in the belief that Perry was the owner.

This proposition, I think, was unexceptional. It proceeds upon the conclusion that Perry's possession was either obtained by fraud, or that the delivery to him was conditional. But neither of these considerations would affect the result, provided

the jury should find the Defendants' claim was bona fide within the terms of this instruction.

A fraudulent vendee can, as we have seen, convey a good title to a bona fide purchaser, and I understand precisely the same rule to obtain where there has been a conditional sale, accompanied by a delivery, or placing the property in the hands, or under the control of the original vendee, with the usual indicia of title (Wait *v.* Green, 39 N. Y., 556).

The consideration has been strongly pressed that the measurer's return was not delivered to the Defendants at the time their advance was made; and it is even insisted that there is no proof that it was in the possession of Perry at the time he obtained the advance. It may be enough to say on this point, perhaps, that the evidence on that subject is not entirely conclusive either way. It is certain that it was sent to his place of business on the morning of the 23d; and it may be claimed there was enough to warrant the jury, if that fact was effectual, in finding that he was in possession of the measurer's return at the time he received the advance. No evidence tending to negative this presumption was given by the Plaintiffs, and it deserves remark that the attention of the presiding Judge was not called to this point in any of the requests to charge, or in the exceptions to the charge as actually given.

It was not material that the Defendants did not obtain actual possession of the measurer's return until the next day. It was undoubtedly an important document, not as a muniment of title in the strictest sense of the term, nor was it so treated by the Judge, who, in answer to a suggestion of the Plaintiffs' counsel as to the scope of his charge on that subject, replied, that all he meant to say was, that by means of the measurer's return the Defendants obtained the bill of lading from the ship, but whether it gave them the legal right to it he did not say.

I think he might safely have said that the measurer's return did entitle them to the bill of lading, and the fact appears abundantly that the bill of lading was actually made out and issued to the Defendants before any demand of the wheat was made by the Plaintiffs, and so far as is shown, before the Defendants were apprised of any assertion, on behalf of the Plain-

tiffs, of any interest in or a right to reclaim the wheat. The fact that the Defendants did not receive the measurer's return until the day after their advance, is in no respect material. In Cartwright *v.* Wilmerding (24 N. Y., 521), this Court has decided that the circumstance, that the pledge and the documentary muniments thereof are separated by some interval of time is not otherwise important than as it may raise a suspicion with the jury that this security was an after-thought.

The Court in that case say, to hold that a person pledging goods "cannot receive the money on one day, and complete the contract of pledge on the next, seems a strange position. . . . . If the time between the two acts (long or short) be such as to throw doubt on the transaction, and create the impression that the advance was a loan without security," then the transaction is not protected.

In this case the interval was but a day, and there is nothing in the conduct of the parties, or the character of the transaction, to raise the suspicion that what they did on the twenty-fourth was an after-thought, and not a fair and legitimate carrying out of the original acts and intents of the parties.

I have not thought it important to notice the several requests to charge made by the counsel for the Defendants, because, in substance, the matter insisted upon by him, so far as the law of the case required, were charged or presented by the presiding Judge to the jury, and a further discussion of them would not be profitable or necessary.

There are some minor exceptions, relating to the reception and exclusion of evidence upon the trial, which were not pressed upon the argument, and which, because of their immateriality, I do not deem it necessary to discuss.

Upon the whole case, I am unable to perceive that any error was committed in the charge and rulings upon the trial, and am of the opinion that the judgment should be affirmed.

All affirm, except CLERKE, J.—but GROVER, J., upon different grounds.

JOEL TIFFANY,
State Reporter.

# THE PEOPLE EX REL. CHARLES F. LIVERMORE AND OTHERS v. ALEXANDER HAMILTON, JR.

*Summary Proceedings—Jury—Challenge—Certiorari.*

In a summary proceeding before a Justice to dispossess a tenant holding over, the Supreme Court is authorized to review all questions properly arising in respect to the proceedings, or during the trial, on the merits of such special proceedings.

The statutory writ awarded in such case is not in the nature of a common law certiorari, limiting the reviewing Court to the question of jurisdiction or regularity of proceedings.

This proceeding is not a civil action within the meaning of the Code, and the parties thereto are not entitled to peremptory challenges.

THE Defendant Hamilton instituted summary proceedings under the statute, before Thomas Stewart, Esq., a Justice of the District Court for the First Judicial District in the city of New York, on the 12th day of May, 1862, to remove the Relators, as tenants, holding over after their lease had expired, of certain premises in the city of New York.

The Relators appeared, and an issue of fact was joined by the affidavits interposed and filed by the Relators. A jury was summoned in accordance with the provisions of the statute, and the twelve jurors nominated by the said Justice were summoned to try the said issue. Upon the trial, the counsel for Mr. Hamilton interposed a peremptory challenge to Frank C. Huntington, one of the jurors drawn by said Justice, and without assigning any cause. The counsel for the tenants objected to the allowance of such challenge, because no cause was assigned, and because in these summary proceedings, the law does not give a peremptory challenge; and the said Justice overruled the

*Summary proceedings—Not actions.* 5 Daly, 484; 7 Hun, 132; 62 *St. Rep.* 71 (30 *N. Y. Supp.* 297; 23 *Civ. Proc.* 421); 13 *Daly,* 278.

*Jury—Special proceeding—Peremptory challenge.* 68 *N. Y. Supp.* 846; 68 *N. Y. Supp.* 847 (9 *Ann. Cas.* 261).

*Certiorari—Questions reviewed.* 55 *N. Y.* 602; 3 *Hun,* 304 (5 *T. & C.* 526).

objection, and set aside the said Huntington as a juror, to which decision the counsel for the Relators duly excepted.

There were various objections and exceptions taken to the ruling of the said Justice upon questions of evidence, and to his charge, and to his refusal to charge certain requests to the jury.

The case was tried, and the jury decided in favor of the landlord, and the Relators were dispossessed by the judgment of the said Justice, and the Relators removed the said proceedings and determination or judgment into the Supreme Court, by certiorari, and the General Term of the First District reversed the proceedings and determination, and gave judgment against the said Hamilton for $94.74 costs on the certiorari; and from this judgment and determination of the General Term the Defendant Hamilton has appealed to this Court.

*J. Larocque* for Appellant.
*E. R. Robinson* for Respondents.

MASON, J.—The Respondents claim, and insist, that no appeal lies to the Court of Appeals from the determination of the General Term in this case. Since the amendment made to § 11 of the Code (chap. 723 of the Laws of 1857), an appeal lies to this Court from a final order affecting a substantial right made in a special proceeding, at a General Term of the Supreme Court (Code, § 11, sub. 3). This is not a common law certiorari, where the Supreme Court is limited to a review of the question of jurisdiction and the regularity of the proceedings.

Under the statutory writ, the Supreme Court is authorized to review, at least, any question of law occuring, either in the proceedings, or upon the trial, and may review the rulings upon the challenge to jurors, questions of the admission or rejection of evidence, and the charge upon the law of the case to the jury (Anderson *v.* Prindle, 23 W. R. 616; Niblo *v.* Post, 25 W. R. 280; Morewood *v.* Hollister, 2 Seld. R. 309). And that the Court may require the evidence to be returned, and may look into the evidence so far, at least, as to see whether it showed a conventional relation of landlord and tenant.

This was expressly held in this Court, in the case of Benjamin *v.* Benjamin (1Seld. R. 383). There can be no doubt that, upon this writ, it is the right and the duty of the Supreme Court to interpose to correct mistakes in the law bearing upon the merits of the case, and to see to it that the officer before whom the proceeding were had kept within the pale of the law in conducting the proceedings. The Supreme Court was fully authorized to review the decision of the justice in this case, in allowing to this Defendant a peremptory challenge, and in setting aside Mr. Huntington, a juror, upon such challenge. I am quite satisfied, also, that the Supreme Court was right in holding that act of April 27, 1847, giving the right of peremptory challenge, upon the trial of an issue of fact joined in a civil action, does not apply to such an issue as this, in summary proceedings by the landlord against the tenant to obtain the possession of demised premises.

This act provides that, "upon the trials of any issue or issues of fact, joined in a civil action, each party shall be entitled peremptorily to challenge two of the persons drawn as jurors for such trials" (1 Laws of 1847, chap. 134, § 1).

These summary proceedings are not civil actions within the meaning of the Code (see §§ 1, 2, and 3 of the Code). Nor were they so before the passage of the Code (Hyatt *v.* Seeley, 1 Kernan R. 55).

It is not a civil action, as has frequently been held (Miner *v.* Burling, 32 Barb. R. 540; People, ex rel. Nevins *v.* Willis, 5 Abbott Pr. R. 205; People ex rel. Livermore *v.* Hamilton, 15 Abbott Pr. R. 328; Haviland *v.* White, 7 How. Pr. R. 154; Williams *v.* Bigelow, 11 How. Pr. R. 83). The 36th section of the statute, as amended by the Act of April 3, 1849 (Laws of 1849, 291, chap. 193, § 4), which declares that, "six of the persons so summoned shall be drawn in like manner as jurors in Justices' Courts," does not extend the right of challenge in this case.

It is a forced and unreasonable construction of the plain language of this statute to extend it to embrace the peremptory

right of challenge of this case. All that this statute says, or means, is ,that the jury shall be drawn in the same manner as jurors in Justices' Courts are drawn.

It is confined, in its language and meaning, to this mode of drawing the jury, and never was intended to alter the law of challenge secured to the parties. The right of challenge depending either upon the common law or statute, is one thing, and the drawing the jurors from the panel summoned, is quite another and different thing. The one has reference to the ministerial duty of the Justice and constable—the Justice in writing on several and distinct pieces of paper, as nearly of one size as may be, and which the constable, in the presence of the Justice, is to roll up or fold, as nearly as may be, in the same manner, and put them together in a box, or some convenient thing, and then the Justice is to draw out the number required (2 R. S. 243, §§ 99, 100); while the right of peremptory challenge is the act of the party alone which sets aside the juror drawn, without act, decision, or interposition of the Justice at all.

This act, requiring the jury to be drawn in the same manner as jurors in Justices' Courts, has reference to this mode and manner of drawing, and ought not to be held as extending, by implication and construction, the right of peremptory challenge given by the statute of 1847, which, in its very language, limits the right of peremptory challenge to the trial of fact joined in civil actions.

The Supreme Court were clearly right in reversing these proceedings, for this error of the Justice, in allowing the Defendant's peremptory challenge to the juror Huntington, and setting him aside.

The judgment of the Supreme Court must be affirmed, with costs to the Respondent.

All affirm.

JOEL TIFFANY,
State Reporter.

## JOSEPH HOXIE, RESPONDENT, v. DANIEL B. ALLEN, APPELLANT.

*Evidence—Expert—Opinion—Claim against the Government.*

In an action to recover for services rendered in procuring the adjustment of claims against the Government of the United States, it is competent to prove by a competent witness, what, in his opinion, the services rendered were worth.

THIS was an action to recover the value of the Plaintiff's services in procuring the release, at Washington, of the steamship S. S. Lewis, which has been condemned for a violation of the revenue laws.

The employment was not denied in the pleadings, nor the rendering of service. The question was upon the value, simply. The only question made in the Appellant's points is in relation to the evidence given by E. K. Collins.

Mr. Collins testified that he had been in Washington, with respect to getting through claims against the Government, in which he was interested; that he had had contracts with the Government, and had had claims against the Government for services rendered to the Government; that he had business at Washington with the Departments. He was then asked: "From that knowledge, and from the statement of Mr. Hoxie, as to his services, what do you think is the value of the services, as described?" To this question the counsel for the Defendant objected. After being informed of the value of the property restored, he gave an answer to the question.

The jury found for the Plaintiff. The judgment upon the verdict was affirmed at the General Term, and the Defendant now appeals to this Court.

---

*Exception to testimony—Construction.* 6 *Abb. N. C.* 132n.

*C. A. Rappalo* for the Appellant.
*J. H. Reynolds* for the Respondent.

HUNT, Ch.J.—The objection to the evidence of Collins seems to have been to its character, and not to his competency to give it. If the objection had been made at the trial, that he had not sufficient knowledge to speak upon the subject, it might have been obviated.

The competency of the evidence, in its nature, was a fair subject of general objection, and to that the objection must be deemed to have applied.

That this is a fair construction of the objection, is evident from the circumstance that the objection, and in the same form, was also made to the testimony of Mr. Briggs, whose capacity to speak upon the subject was quite apparent.

I think the judgment should be affirmed.

All concur, except CLERKE, J.

CLERKE, J. (dissenting.)—This action was brought to recover the value of services rendered to the Defendant by the Plaintiff, in presenting to the President of the United States an application for the remission of the forfeiture of the steamship S. S. Lewis, and for procuring the discontinuance of proceedings commenced, on behalf of the United States, for the forfeiture of the steamships Independence and Pacific. The sum claimed was $5,000. The Defendant, in his answer, admitted the performance by the Plaintiff of the services, but alleged that the value of them did not exceed the sum of $500.

Upon the trial the Plaintiff called E. K. Collins. He testified that he had been, for many years, engaged in business in the city of New York, and had owned steamships; that he had been in Washington for the purpose of getting claims through for services which he had rendered to the General Government; that he had had contracts with the Government.

On this statement, the following question was put to him:

"From your knowledge of steamships, and of the trouble connected with the prosecution of claims at Washington,

against the Government, and from Mr. Hoxie's statement of his services, as given here to-day, what do you think is the value of those services."

The counsel for the Defendant objected to this question. The Court overruled the objection, and the counsel excepted.

The only question, then, for us to consider is, whether this objection was well taken.

I am not aware that the old rule relating to the opinions of witnesses has been materially relaxed. The rule is confined, for the most part, to the opinions of men of science, art, or skill in some particular branch of business; as, for instance, those of medical men, ship-builders, underwriters, engineers, and artists. Such witnesses may be called to say what, in their opinion, would be the result of certain facts submitted to their consideration; but not to give an opinion on things with which a jury may be supposed to be equally well acquainted.

The Court must first ascertain whether the witness is an expert—whether he is skilled in the matter in relation to which his opinion is desired. The opinion of witnesses as to the value of services cannot be allowed, unless they are acquainted with the prices commonly paid for such services, or have had such services rendered to themselves. (Lamoure *v.* Caryl, 4 Den., 370.)

The opinion, indeed, of an attorney, as to the value of professional services rendered by another attorney, and which he has heard described by other witnesses, is admissible. In respect to the value of such services, a member of the profession may be regarded as an expert (Beekman *v.* Platner, 15 Barb. 550). But, the opinion of a witness who has had no special and continuous opportunities of estimating the value of services, cannot be reliable, and therefore should be inadmissible.

It did not appear, from the evidence of Collins, or any other witness, that he had ever performed services similar to those for which the Plaintiff demanded compensation, or that he had ever engaged others to perform such services, or that he had

special knowledge of the subject, or experience in relation to it greater than the generality of people.

If the opinion of Collins is evidence on this subject, the opinion of any man casually in Court may be also received as evidence.

He had had contracts with the Government, and had been in Washington for the purpose of getting claims through against the Government, but he had never spent any time there in getting contracts (fol. 55). He had never interceded with the Government, with the President, or any of the heads of Departments, to have forfeitures remitted, or proceedings to effect forfeitures discontinued.

No foundation was laid to warrant the admission of this testimony.

The judgment should be reversed, and a new trial ordered; costs to abide the event.

Affirmed.

JOEL TIFFANY,
State Reporter.

## DANIEL McCABE, APPELLANT, v. WM. P. BRAYTON, LATE SHERIFF, &c., RESPONDENT.

*Principal and Agent—Fraud—Evidence—Credibility.*

Where there is any evidence to sustain the verdict of the jury, or the finding of the referee, this Court cannot review his or their determination.

ACTION to recover possession of certain dry-goods which the Plaintiff claimed as his property, and which he claimed he had delivered to one Carroll, as agent, to sell on Plaintiff's account, and for his benefit.

The Defendant claimed that the goods were the property of Carroll, and made title thereto in himself under an execution issued out of the Supreme Court, against Carroll, which he, as Sheriff, had levied upon said goods.

The cause was referred, and, upon trial before the referee, it appeared that a store was kept at Cohoes, in the name of the Plaintiff, in which dry and fancy goods, principally furnished by the Plaintiff, had been kept for sale, for several years prior to the levy, and that the store was attended, and the business transacted by Carroll, acting as agent for the Plaintiff, as he claimed. The question of fact litigated was, whether the goods were furnished by the Plaintiff, to be sold by Carroll, as his agent, or whether they were sold by Plaintiff to Carroll; and

---

*Assignment—Fraud—Proof.* 18 *Misc.* 409 (42 *N. Y. Supp.* 777).

*Evidence—Motion to strike out—Grounds for.* 7 *Misc.* 55 (57 *St. Rep.* 511; 27 *N. Y. Supp.* 341); 8 *Misc.* 292 (59 *St. Rep.* 209; 28 *N. Y. Supp.* 572; 31 *Abb. N. C.* 438).

*Credibility—Testimony on former trial.* 2 *Hun,* 45, (4 *T. & C.* 317); 61 *Hun,* 422 (41 *St. Rep.* 9; 16 *N. Y. Supp.* 220).

*Trial—Evidence stricken out—Trial.* 41 *App. Div.* 347 (58 *N. Y. Supp.* 563); 3 *Misc.* 306 (52 *St. Rep.* 122, 22 *N. Y. Supp.* 933); 18 *Misc.* 36 (75 *St. Rep.* 462; 41 *N. Y. Supp.* 12); 27 *Misc.* 782 (57 *N. Y. Supp.* 750).

*Requests to charge—Definiteness.* 8 *Misc.* 249 (59 *St. Rep.* 231; 28 *N. Y. Supp.* 726).

the claim, that he received them as agent, to sell for the Plaintiff, was a mere device to enable Carroll to defraud his creditors.

The referee found for the Defendant, and ordered judgment for him; which was affirmed, upon appeal, by the Supreme Court ,from which the Plaintiff appealed to this Court. Several exceptions were taken to rulings of the referee upon the admissibility of evidence, and also to the finding of facts. The facts upon which the questions arise will be found in the opinion.

*Samuel Hand* for Appellant.
*J. F. Crawford* for Respondent.

GROVER, J.—The referee found that the goods in question, at the time of the levy thereon by the Defendant, were the property of Carroll. This finding determined the case in favor of the Defendant. The exceptions taken by the Plaintiff thereto only raise the question, in this Court, whether there was any evidence to sustain it.

In the Supreme Court the question thus presented was different. The latter Court were to inquire whether the finding was against the weight of evidence, and, if so, to reverse it.

The case shows there was evidence in support of the finding. The proof shows that the business had been carried on for several years prior to the levy; that goods were, from time to time, at the request of Carroll, sent by the Plaintiff to the store; that an account of the goods, at wholesale prices, was kept by the Plaintiff, who resided and kept a store in New York; that money was from time to time sent by Carroll to the Plaintiff, and an account of such moneys also kept; that no other accounts were kept between the parties; that from time to time these accounts were looked over, and balances struck; that Carroll had the entire charge of the business, and paid his family and other expenses from the proceeds of the sales of the goods, of which no account was kept, and no reference thereto found in looking over the accounts kept by the Plaintiff and Carroll.

This evidence tended to show that the real transaction was a sale of the goods by the Plaintiff to Carroll, as found by the

referee; and, as above remarked, this Court, in this case, cannot examine the evidence to determine its weight.

The exceptions taken to the rulings of the referee, upon the competency of evidence, must be determined by an examination of the entire evidence in the case. Many of these exceptions were taken to the admission of evidence introducd with a view to show fraud between the Plaintiff and Carroll, as to the creditors of the latter, before the Defendant had put himself in a position to attack the title of the former upon that ground. These exceptions were, at the time, primâ facie, well taken; but the Defendant afterwards proved the judgment, and execution issued thereon against Carroll, and the levy by him upon the goods in question.

This, by showing his right to attack the title of the Plaintiff, upon the ground that it was fraudulent as against the creditors of Carroll, took away the objection, so far as it depended upon that.

The Defendant had the right to prove the assignment by Carroll to Lyndon, made in 1854, and the purchase of the goods assigned by the Plaintiff, of Lyndon, who paid the nominal consideration upon such purchase, and what was done with the goods after such purchase. These facts, while they did not establish fraud between Carroll and the Plaintiff, were proper to be taken into account, in determining the nature of the dealings between the Plaintiff and Carroll, to show whether the Plaintiff at that time, was establishing a business of his own at Cohoes, to be conducted for his own benefit and upon his own account, or whether he was acquiring the nominal title to the goods and business, while the real title and interest remained in Carroll.

The same answer is applicable to the exceptions to proof given of the business transacted by Carroll and the Plaintiff subsequent to this purchase, and of the mode of conducting such business. It was competent, upon cross-examination of Carroll and the Plaintiff, to inquire what they had testified to, upon previous occasions, as to the business, so far as the same tended to affect the credibility of the evidence given by them in the case upon trial, and, in case they were unable to state how

they did testify, to ask, hypothetically, if they testified in a given way, whether it was true. This the witness might answer, or not, as he chose; and when he had testified that he did not recollect, it would have been error to compel an answer to the hypothetical question.

The examination is allowable merely as a mode of determining the credibility of the witness. If the witness answered he did not recollect how he testified, but if he did testify as supposed it was true, it would be error to receive evidence that he did in fact so testify, as proof of the fact. That would be determining the issue, not upon the proof given in the case, but upon testimony given in other proceedings. Evidence of what a witness swore to on previous occasions is admissible only upon the question of his credibility.

But asking the hypothetical question, and receiving the voluntary answer of the witness, to test his credibility, is not error. It does not appear that anything more was allowed by the referee upon the present trial. Evidence of debts owing by Carroll, and of compositions made by him with creditors, during the time the business was carried on between him and the Plaintiff, was competent.

It tended to show a motive on his part for adopting the mode of conducting his business with the Plaintiff, as claimed by the Defendant.

Crawford finally testified, that he knew that all the minutes of previous testimony of the Plaintiff and Carroll, read by him, were correctly taken at the time they were taken.

This placed such minutes upon the same footing as though wholly taken by him. The exception upon that ground was not well taken.

The motion to strike out the evidence of Crawford, showing what the Plaintiff and Carroll had testified to upon previous occasions, was properly denied.

The motion embraced the entire testimony given by the witness showing this. As to the witness Carroll, a portion of such testimony was competent and a portion incompetent.

The same remark is applicable to his testimony showing that of Plaintiff. The motion should have been restricted to the in-

competent portions, and then its denial would have been error.

The judgment appealed from should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

---

PETER FLORA, APPELLANT, *v.* PETER CARBEAU, JR., RESPONDENT.

*Trespass—User of Way—License— Parol Evidence of Title.*

A license to travel over the land is revocable at the pleasure of the owner of the land.

Although twenty years' user of a way over another's land may raise a presumption of right or of adverse claim, yet when it appears that the use began in mere license or indulgnce, this presumption ceases, and the continued use, though for more than twenty years, will not prejudice the title of the owner.

When evidence bearing upon a material question in the cause is received on the trial in favor of the party against whom judgment is rendered, though it is in its nature incompetent, and is objected to, it must stand as evidence in the cause for all the purposes of a review of the case on his appeal from the judgment. The Court cannot, on appeal, disregard it. Non constat but if it had been excluded, other and competent evidence to the same facts might have been given.

THE action was brought originally in a Justice's Court by the Plaintiff, for damages for the cutting down and removing his fence. The answer of the Defendant creating an issue which involved the title to real estate, the action was removed

---

*Incompetent evidence—Effect.* 45 *N. Y.* 808; 99 *N. Y.* 101; 55 *N. Y.* 669; 134 *N. Y.* 160 (45 *St. Rep.* 774); 139 *N. Y.* 384 (54 *St. Rep.* 661; 30 *Abb. N. C.* 424); 149 *N. Y.* 400; *D.* 90 *Hun,* 599, (70 *St. Rep.* 567; 35 *N. Y. Supp.* 993); 45 *App. Div.* 26 (60 *N. Y. Supp.* 813); 47 *App. Div.* 172 (62 *N. Y. Supp.* 223); 91 *Hun,* 92 (71 *St. Rep.* 704; 36 *N. Y. Supp.* 685).

*Appeals—Presumption as to books.* 167 *N. Y.* 371.

*Adverse possession.* 162 *N. Y.* 222; 42 *Misc.* 273 (86 *N. Y. Supp.* 612); 4 *Lans.* 17; 5 *Lans.* 212; 7 *Lans.* 262.

*Myers & Magone* for Appellant.

to the Supreme Court. The defence was a justification as the servant of the Defendant's father, who had, as it was alleged, a right of way across the Plaintiff's land, at the place where the Plaintiff had built the fence.

The action was tried before a referee, who found that the land of the Plaintiff was wild land until about twelve years before the alleged trespass; that a road from the land now of the Defendant's father was cut and used across the land now of the Plaintiff more than twenty years before the fence was built; that it had been used by the father of the Defendant and his family, on foot and with teams, more than twenty years before any fence was built across the road; that the Defendant and his neighbors worked on the road from year to year; and that no public road touched the lot of the Defendant's father, nor any private road but the one in question.

On the trial the Defendant testified in his own behalf, and on cross-examination stated that the farm of the Plaintiff was "on the Van Rensselaer tract or gore;" that "that part of the gore through which the road passed was woods and unoccupied as a farm until . . . . . twelve or thirteen years ago;" and that he understood that Mr. Van Rensselaer was the owner of the land as long ago as he could remember. His counsel objected to this testimony, elicited by the Plaintiff's counsel on cross-examination of the Defendant, but the objection was overruled. He further testified: "I heard him" (his father) "say he had permission from Mr. Van Rensselaer or his agent to travel across this land."

Other facts are adverted to in the opinions, which it is not necessary to state.

The referee held, "that the Defendant had acquired a right of way across the Plaintiff's lot"—thus sustaining the alleged justification of the Defendant in removing the fence built by the Plaintiff across the road in question, and ordered judgment for the Defendant.

The judgment was affirmed in the Supreme Court in the Fourth District, and the Plaintiff appealed to this Court.

*Morris & Vary* for Respondent.

WOODRUFF, J.—The referee states, a conclusion of law, "that the Defendant had acquired a right of private way across the Plaintiff's lot;" and the conclusion followed, that he was justified in the act complained of as a trespass. By this was meant that the father of the Defendant, under whose authority and as whose servant he justified, had such a right of way.

The referee finds a use of this way by the Defendant's father for more than twenty years. He does not find how the use began, or whether there was a grant thereof to him, or to any one under whom he claims, nor whether the use was adverse, nor whether it was under claim of right.

He does find that the lot of the Plaintiff was wild land when the road was opened, and some twelve or fourteen years ago the lot of the Plaintiff began to be cultivated.

It is not competent for the Respondent to insist, on this appeal, that the evidence offered to show that the land of the Plaintiff, over which the right of way is claimed by the father of the Defendant, belonged to Van Rensselaer when the use of the way began, was inadmissible.

It was received, and being received, the Plaintiff had a right to rely upon it. If testimony tending to establish a material fact, although incompetent in its nature, is received without objection, or if, as in this case, being objected to, it is received, notwithstanding the objection, the party has a right to insist upon the facts shown thereby; and it will not be just to say, on appeal, that such evidence ought not to have been received, and may therefore be now disregarded. Such a view of the subject would be manifestly unjust.

First. It would mislead and entrap the party to his prejudice.

Second. If the Court, on the trial, excluded the evidence, he could have his exception, and bring the correctness of the ruling under review; and

Third. Which is most of all important: If the evidence had been rejected, he would have had the opportunity to supply the defect by other proof.

Nothing is more common than for testimony to be given, which is not in its nature strictly competent, upon matters about which both parties are conscious that there is no dispute—matters which both understand to be true. And such evidence is taken because the adverse party makes no question of the fact it tends to establish.

He can never be permitted to say, on appeal, that the fact was not proved, because the evidecne offered and received was not competent testimony, and ought to have been objected to, and rejected; and if objected to, and the objectioin is overruled, the ruling for all the purposes of a review of the case by the party giving the evidence, must be taken to be correct.

In this case the land in question is declared by the Defendant himself to be "on the Van Rensselaer tract or gore;" that it "was woods and unoccupied as a farm until . . . twelveor thirteen years ago;"—and that he understood Mr. Van Rensselaer was the owner of the land as long ago as he (I) can remember.

Observe, this is the Defendant himself—the alleged trespasser. This evidence is of the same character as that by what the title of the farm of the Defendant's father was mainly proved.

The witness calls it "my father's lot," "father's farm," etc.

The Defendant objected to the above evidence in regard to Van Rensselaer's title, "as incompetent to prove, by parol, or hearsay title to land in Van Rensselaer," and the objection was overruled—probably on the ground that it was, in substance, an admission by the Defendant himself that Van Rensselaer owned the lands.

But whether it was competent on this ground, or on any other, or was incompetent, it was ruled competent evidence to show such title, and had it been rejected, the Plaintiff would, at least, have had the opportunity to establish the fact by other evidence.

Then followed the testimony to the declarations of the De-

fendant's father, the claimant of the right, and as whose servant the Defendant justifies, viz.: that "he had permission from Mr. Van Rensselaer, or his agent, to travel over this land."

As to this testimony, whether competent or not, the same observations are pertinent. It was offered, in terms, to establish that the use was by license, and not adverse to the owner. It was objected to and received, possibly upon the ground that the declaration of the master, under whose then present alleged title and authority the servant justifies, is evidence; or, possibly, upon the ground that if A instructs his servant to drive his team across B's land, declaring to him that he has a license from B to travel over it, and the servant justifies, alleging title in A, and authority from A for the trespass, the admission of A is competent as a part of the res gesta; it shows under what claim of right the authority to the servant was given by the master, and received and acted upon by the servant.

But, as before, whether competent or not, it was received, and the Defendant is entitled to the benefit of it.

The case stands thus upon the eveidence: Van Rensselaer owned the locus in quo; it was wild land, uncultivated. He gave to Defendant's father permission to travel over it, and he did so, constructing, and, from time to time, repairing the road, for more than twenty years.

Then the owner builds a fence across, and obstructs the road, practically and effectually revoking the license, if it be deemed a license merely.

It is suggested that if it be assumed that the use originated in a "permission to travel over the land, that is not necessarily a mere license." I do not perceive the force of the suggestion. It is certainly an admission that but by permission of Van Rensselaer he would not be at liberty to travel over it. It assigns that permission as the reason for doing so. It not only does not assert a right adverse to Van Rensselaer, but on the contrary, by the clearest implication. It asserts no right, or claim of right, save only a permissive one.

If he had used the word "license" itself, his language would have been no more clear in its natural, or in its legal import—for license is permission, and nothing else.

Besides, the referee does not find that the use of the way has been adverse, or under claim of right, or with the knowledgs or acquiescence of the owner. (See Colvin *v.* Burnet, 17 Wend. 564, 568; Sargent *v.* Ballard, 9 Pick. 255; Parker *v.* Foote, 19 Wend. 313, and cases cited).

If it be here conceded that twenty years' use of a way over lands situated as these were, would, as matter of evidence, raise a sufficient presumption that the party claimed the right, that the use was adverse, and that the owner knew and acquisced, still the moment it appeared that the use began in mere license or indulgence, there was an end to all presumption. Thus BRONSON, J., in Parker, *v.* Foote, says, to authorize the presumption of grant, "the enjoyment of the easement must not only be uninterrupted for the period of twenty years, but it must be adverse, *not by leave or favor,* but under a claim or assertion of right, and it must be with the knowledge and acquiescence of the owner."

How do the terms, *"by leave or favor,"* differ from *"by permission?"* So Chief-Justice PARKER, in Gayette *v.* Bethune (14 Mass. 53), says, it "must be adverse, or of a nature to indicate that it is claimed as a right, and not the effect of indulgence, or of any compact short of a grant."

And in White v. Spencer (14 N. Y. 249), DENIO, Ch.J., says of the possession and enjoyment of an easement, "if it were by liecense, no length of enjoyment would prejudice the title of the proprietor."

And in Colvin *v.* Burnet, COWEN, J., says with singular aptness to the condition of wild lands, "non constat that the whole may not have been as lessee or by comity until the owner shall reach the time when, for purposes which remained suspended, *on account of the mere convience of his neighbor,* he comes in for the enjoyment of his conceded rights."

For these reason I think the judgment should be reversed, and a new trial granted, with costs to abide the event.

It is proper to add, on the question raised by the Respondent, whether this Court has jurisdiction of an action originally commenced in a Justice's Court, that after the decisions reported in 6 How. 320, and 7 How. 402 and 404, the Code was amended in 1857, and there is now no doubt that the Court has jurisdiction, where the action before the Justice is discontinued because a plea of title to land is interposed.

All reverse, except Bacon, Clerke, and Miller, JJ.

Bacon, J. (dissenting.)—The Plaintiff, Flora, sued Carbeau in Justice's Court for trespass, in crossing his farm and cutting down a fence. Carbeau plead title, and the action was carried into the Supreme Court, under the statute. The pleadings are the same as in the Justice's Court.

The action in the Supreme Court was referred to Hon. John Fine, sole referee, and was tried before him at Ogdensburgh, July 31, 1861.

The referee found for Defendant, to which findings of fact and of law the Plaintiff duly excepted, and from the judgment entered on the finding of the referee appealed to the General Term for the Fourth District, on a case and exceptions.

The General Term affirmed the judgment, and from the judgment entered therein the Plaintiff appealed to this Court.

The material facts found by the referee are as follows:

That Plaintiff, in May, 1861, occupied the Hawley farm, on the gore.

That Defendant has three times removed one of Plaintiff's fences or bars, and the damage was agreed upon at one dollar.

That the fence removed stood on a track or road which ran through the lot of the Plaintiff.

That this road was cut and used twenty years and more before any fence was bulit acroos the road. The Defendant and his neighbors have worked on it from year to year.

That a few years ago the fence in question was built, which obstructed the road, and for the removal of which this action was brought.

That Defendant has occupied, for nearly thirty years, a forty-acre lot next to, and adjoining the lot of the Plaintiff, on the east.

That the road in question runs from Defendant's house across Plaintiff's lot to a sand-pit, which is on the west line of Plaintiff's lot.

That no public road touches Defendant's lot, nor private, except the one in question.

That the road from Defendant's house to the sand-pit had been used by the Defendant and his family, a-foot and with teams, for more than twenty years before any fence was built across the road.

That the part of the road from the Defendant's house to the sand-pit has not been materially altered since it was first opened.

That all of the lot of the Plaintiff was wild land when the road was first opened, and began to be cultivated tweleve years ago.

Upon these facts the referee found, as conclusions of law: 1. That the Defendant had acquired a right of way across the Plaintiff's lot; 2. That it was not necessary that the party claiming the right should claim it under a grant. If the land was used by permission of the Plaintiff or his grantors, it is a fact to be proved by the Plaintiff.

There is another finding of law touching the alteration of the route of the road, on which no point was made in the Court below, or by cousel on this appeal, and it is therefore immaterial to state it.

The proof, in regard to which there was really no controversy, is ample to show that the father of the Defendant, under whom he justified the acts of trespass complained of, had a road leading from his house to the main river road, across the land of the Plaintiff, and which he and his family had used, both a-foot and with teams, for more than twenty years; that it had, from year to year, been repaired by the Defendant's father and his neighbors, and that it was the only road leading from his farm to the public highway. This use had

been uninterrupted for more than twenty years, and was not questioned until the acts of the Plaintiff, in erecting and endeavoring to maintain the fence which obstructed the right of way.

This proof justifies the finding of the referee, that the Defendant had acquired a right of way across the Plaintiff's lot, and is entirely within the principles decided in the case of Miller *v.* Garlock (8 Barb. 153). All that is necessary to establish the right is, that the use should be continuous, uninterrupted, exclusive—that is, under a claim of right, with the knowledge and acquiescence of the owner.

The counsel for the Appellant insists that the referee should have found, in so many words, that there was an uninterrupted adverse use for twenty years.

But to this the reply is, that the uninterrupted use and enjoyment of a right of private way over the land of another becomes an adverse enjoyment, and is sufficient to raise a presumption of a grant.

The use of an estate for twenty years, unexplained, will be presumed to be under a claim or assertion of right, and adverse, and not by the leave or favor of the owner. See case cited (supra), and Gayette *v.* Bethune (14 Mass. 53).

It is claimed by the Appellant that the legal conclusion of the referee, that it is not necessary that the party claiming the right of way should claim it under a grant, was errroneous.

Taken as an abstract propositon, this is undoubtedly an error; but it is quite clear, I think, that what the referee intended to say was, that it was not necessary for the Defendant to prove a grant, by the production of a conveyance or paper title.

His conclusion obviously was, that the right might be claimed and maintained by prescription without otherwise having a grant, since the doctrine of prescription if founded on the presumption of a grant, and obviates the necessity of actual proof of it.

This prescriptive right is clearly and necessarily the ground

of his judgment; and the finding, on this proposition, is not in conflict with his general conclusion, that the Defendant had acquired, by means of the uses, which he had fully set forth in his findings of fact, the right of way which constituted the defence of the Defendant's acts.

There was no sufficient proof of a license to Defendant to pass over this land from any party that had ever owned the land. All there was in the proof on this subject was drawn out on the cross-examination of the Defendant, who, it will be remembered, is the son of the party who claimed the easement, and is merely to the effect that the Plaintiff occupied, etc., land in the Van Rensselaer tract or gore, and he understood Van Rensselaer owned the land, and had heard his father say he had permission from Van Rensselaer, or his agent, to travel on this land.

I concur in the opinion of the Court below, that this proof was not sufficient to show a license.

It should have been proved that Van Rensselaer was the owner, and the nature of the license—how far it existed, what kind of travel was permitted, and under what qualifications or restrictions.

The proof was of the loosest possible description, and upon it the referee could, in my opinion, hardly have been warranted in finding a license, revocable in its nature, and actually revoked by the building of the fence.

The referee was not requested, so far as appears by the case, to find any such fact, nor is his failure to find it made the ground of any exception on the part of the Plaintiff.

I think the judgment should be affirmed.

Reversed.

JOEL TIFFANY,
State Reporter.

# GIDEON FOUNTAIN v. DANIEL L. PETTEE.

*Evidence—Grounds of Objection—Error—New Trial.*

It is incumbent on a party objecting to the reception of evidence, to communicate to the Court and opposite party the nature and grounds of his objection, to entitle himself to a new trial for an error in overruling such objection.

MASON, J.—This an action of assault and battery, tried before a Judge and jury in the Kings County Circuit, and the Plaintiff recovered a verdict of $750, which was affirmed by the General Term, on appeal taken by the Defendant, and the Defendant has appealed to this Court from the judgment.

The charge of the Judge is not contained in the case, and the verdict is fully warranted by the evidence, assuming that the jury believed the Plaintiff and his evidence, which it was wholly their province to do, if they were impressed with the truthfulness of his testimony.

The only questions which can be reveiewed in this Court are the rulings of the Judge upon questions of evidence.

The Plaintiff was a collector of wharfage of Pier No. 35, North River, and called on the Defendant, an iron-dealer, at his office, 228 Water street, New York, to collect a bill for wharfage of a boiler belonging to the Defendant, and spoke to him about the boiler, which, it seems, the Defendant knew nothing about; and some words ensued between the parties

*Appeal—Inadmissible evidence—Failure to object.* 1 *Misc.* 437 (51 *St. Rep.* 53; 21 *N. Y. Supp.* 916).

*Evidence—Grounds of objection.* 77 *N. Y.* 188; 85 *N. Y.* 417; 114 *N. Y.* 498 (24 *St. Rep.* 81); 10 *Hun,* 104; 24 *Hun,* 11; 34 *Hun,* 135; 37 *Hun,* 42; 63 *Barb.* 268; 6 *Lans.* 419; 40 *Super.* 394; 47 *Super Ct.* 301.

as to the ownership of the boiler; and they got so much at issue over that question that the Plaintiff did not present the bill to the Defendant before he was ordered to leave.

It therefore became very proper for the Plaintiff to explain why he did not make known to the Defendant that he came to collect the bill for wharfage on the boiler, and with that view he was asked the question—*"Why did you not tell the Defendant more of the purpose that called you there?"* To this question, the case says, *"the Defendant's counsel objected;"* which objection was overruled by the Court, and the Defendant's counsel excepted.

There are two answers to this exception. In the first place, the evidence was complete, as tending to show that the Plaintiff went there on business, and was lawfully in the Defendant's office, and that his omission to communicate to the Defendant his business fully was owing to the reason that the Defendant denied all ownership of the boiler, and they got at issue over that.

The second answer is, there is no ground of objection stated to the evidence. The rule requires the party objecting to the evidence to communicate to the Court and to the opposite party, in some form, the grounds of his objection to the evidence, and if he fails to do so, his objection will not avail him on a motion for a new trial.

This is a just and reasonable rule. It is due to the party offering this evidence that he should be informed of the ground of objection to it. The party may choose to acquiesce in the correctness of the evidence, and withhold the same, if the ground of objection is stated.

It is sufficient to say that the rule itself is too well settled to admit of discussion, as will be seen by reference to the cases (Merritt *v.* Seaman, 6 Barb. R. 330; 5 J. R. 467; 8 id. 387; 1 Cow. R. 622; 6 Hill's R. 407; 17 W. R. 257; 24 W. R. 277; 25 id. 437; 1 Den. R. 281; 3 Den. R. 114; 2 Hill's R. 603; 2 Seld. R. 345; 1 Comst. R. 83; 18 N. Y. R. 448; 32 N. Y. R. 440; 20 N. Y. R. 32).

There is still a third answer to this objection. The Defendant afterwards went fully into it himself, and covered any objection there might be (Morgan *v.* Reid, 7 Abbotts' R. 215).

The Plaintiff's counsel asked the Plaintiff the following question: Were you at the time the collector of the wharfage of Pier No. 35, North River?" And to this question the counsel for the Defendant objected, by simply stating that he objected to the evidence.

This objection was properly overruled, for the reasons already stated as to the former objection; and besides, it was entirely competent for the Plaintiff to state his pursuit or business.

This furnishes an answer to the objection taken in folio 25. The question was, "*What was your business?*" And the Defendant simply objected to the evidence, without stating any reason or grounds of objection.

The other objections are all equally frivolous, and the objections are all taken in the same form, and none of them are well taken.

The judgment should be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

THE MAYOR, ETC., OF NEW YORK, RESPONDENTS, *v.* THE HAMILTON FIRE INSURANCE COMPANY, APPELLANTS.

*Insurance—Condition of Policy—Cause of Action—Limitation.*

Where there is a condition in the policy of insurance that no suit or action shall be maintainable against the company for any losses, etc., unless such suit, etc., be commenced within six months after such loss, etc., shall have occurred.

*Held,* that the six months' limitation commenced to run at the time the Plaintiff could have commenced his action to recover for his loss.

*Held,* that although the loss occurred on the 15th of Oct., 1858, the action was reasonably commenced on the 16th day of April, 1859.

THIS was an action to recover upon a policy of insurance. The most of the questions involved have been decided by this Court in the suits against the Excelsior and the Corn Exchange Companies. The only distinguishing point arises upon the tenth section of the conditions of the policy. That section is in these words: "X. In case of any loss or damage to the property insured, it shall be optional with the company to replace the articles lost, . . . and to rebuild or to repair the building or biuldings within a reasonable time, giving notice of their intention to do so within thirty days after having received the preliminary proofs of loss required by the ninth article of

*Insurance—Action for—Limitation.* 61 *N. Y.* 604; 72 *N. Y.* 502; 73 *N. Y.* 152; 77 *N. Y.* 244 89 *N. Y.* 323; 97 *N. Y.* 195; 137 *N. Y.* 403 (50 *St. Rep.* 686); 9 *Hun,* 400. 523; 43 *Hun,* 65 (26 *Week. Dig.* 18); 2 *T. & C.* 274; 9 *App. Div.* 7 (40 *N. Y. Supp.* 1115); *D.* 9 *App. Div.* 357 (41 *N. Y. Supp.* 320); 95 *App. Div.* 87 (88 *N. Y. Supp.* 530); 15 *Misc.* 613, (73 *St. Rep.* 119; 120; 37 *N. Y. Supp.* 494); 27 *Misc.* 249 (57 *N. Y. Supp.* 781); 14 *Abb. N. S.* 323; 45 *How. Pr.* 457; 36 *Super Ct.* 126.

*Limitation—When statute runs—Notice—Claims against municipality.* 132 *N. Y.* 338 (44 *St. Rep.* 553); 57 *Hun,* 410 (32 *St. Rep.* 725; 10 *N. Y. Supp.* 748); 77 *Hun,* 38 (59 *St. Rep.* 443; 28 *N. Y. Supp.* 230); 61 *How. Pr.* 146.

these conditions; and it is hereby expressly agreed that no suit or action of any kind against said company, for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any Court of law, unless such suit or claim shall be commenced within the term of six months after any loss or damage shall accrue; and in case any such suit or action shall be commenced against said company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

"XI. Payment of losses shall be made in sixty days from the date of the adjustment of the preliminary proofs of loss by the parties."

"IX. Persons sustaining loss or damage by fire shall forthwith give notice thereof, in writing, to the company, and shall, as soon thereafter as possible, deliver to the company as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands, which account shall set forth the whole cash value," &c., proceeding at great length and in great detail.

The fire occurred on the 5th of October, 1858. The action was commenced April 16, 1859. Preliminary proofs were secured on the 30th of November, 1858. On the 3d of January, 1859, the Defendants objected to the sufficiency of this proof. On the 12th of February, 1859, additional proofs were secured. On the 18th of February further objections were made to the proofs.

The Plaintiffs recovered in the Court below, and the judgment upon such recovery was affirmed by the General Term of the Superior Court of the City of New York. The Defendants now appeal to this Court.

*James Emott* for Appellants.
*T. H. Rodman* for Respondents.

HUNT, Ch.J.—The defence in this case is based upon a noncompliance with the contract of limitations created by the

tenth condition of the policy. In Roach *v.* The N. Y. & Erie Ins. Co. (30 N. Y. R. 546), the condition in question was held to be valid. We are bound to hold in the same manner in the present case. In Ames *v.* N. Y. Union Ins. Co. (14 N. Y. R. 253), it was held that this condition might be waived by the acts and declarations of the parties, and that it had been waived by the parties in that case. The condition is extremely stringent.

It is in dirogation of the rights of the assured, as given by the Statute of Limitations of the State. It is often not known, or not considered by the assured, and should only be permitted to prevent a recovery when its just and honest application would produce that result. The same cases hold that this condition should be construed in connection with the other conditions of the policy, and so construe it as to give the fullest possible effect to all.

The eleventh condition provides that "Payment of losses shall be made in sixty days from the date of the adjustment of the preliminary proofs of loss." The counsel for the Appellants insists that the word "adjustment" is inaccurately used in this connection; that it is only appropriate in the settlement of marine losses, and then not by means of the actions of parties themselves. This is not impossible. In the preceding condition, when it is said that "unless such suit or claim shall be commenced within the term of six months after any loss or damage shall accrue," the words "loss or damage" were not used with legal precision. "Within six months after the right of action shall have accrued" was, no doubt, what the parties intended. That cut off four years and six months of the right to sue, as given by law; and to hold that it extended as much further as the right to sue and the objection to preliminary proofs might require, with sixty days addedd to that, would require of the sufferer very prompt action indeed, to enable him to receive any benefit from his policy.

But the condition gives the company sixty days from the date of the "adjustment of the preliminary proofs of loss by the parties," before the loss is payable. We all take this

language as it stands. To "adjust," in its fair meaning, is to settle or bring to a satisfactory state, so that parties are agreed in the result (Webster); and that this is a fair reading in the present case, is evident from the use of the words, "by the parties," at the close of the condition. The preliminary proofs are to be adjusted by the parties. The parties are to act upon them by negotiation—by statements on the one side, demands for correction or addition on the other, and compliance with such requests until the parties agree. If they do not agree it can hardly be termed an adjustment by the parties, although the law may itself determine the sufficiency of such proofs. In the present case the parties had not adjusted the proofs so recently as the 12th of February, 1859 when additional proofs were secured, and possibly not as late as the 18th of that month, when the Defendants made still further demand of proofs. I infer that the Plaintiffs relied upon these last proofs as sufficient, and refused to go further, as the case contains no evidence of any further action in that respect. If, however, we fix the time when the preliminary proofs are complete, as on the 12th of February, 1859, the Defendants were under no obligation to pay, and no suit could successfully be commenced against them until sixty days from that date. This is the period, in my judgment, at which the claim becomes perfected against the company. The company is then entitled to a credit of sixty days before it is compellable to pay the debt; at the end of the sixty days the period of six months commences to run. This I understand to be the necessary result of the reasoning of Judge Wright in Ames *v.* The Union Ins. Co. (supra, at pp. 264, 265); at this time, and not before, the Plaintiffs could have commenced their action. The object was to compel an early litigation, within six months after the right to sue attached. The suit was commenced on the 16th of April, 1859, which, in my view of the case, was within four days of the time in which it would have been justified in instituting the proceeding.

The preliminary proofs were first secured on the 30th of November. No objection appears to have been made that

they were not secured in time. If the six months were counted from that date—a rule much too favorable to the Defendants —the suit would still have been commenced in time.

The judgment should be affirmed, with costs.

Affirmed. JOEL TIFFANY,
State Reporter.

---

THEODORE T. EDGERTON, RESPONDENT, *v.* THE NEW YORK & HARLEM RAILROAD CO., APPELLANT.

*Negligence—Presumption—Rights of Passenger Riding on Freight Trains.*

Although the caboose attached to a freight train is not designed for the

---

*Contributory negligence—Question of fact.* 67 *N. Y.* 597; 173 *N. Y.* 570; 37 *St. Rep.* 517 (13 *N. Y. Supp.* 871).

*Negligence—Pleading—Demurrer.* 72 *App. Div.* 164 (76 *N. Y. Supp.* 308).

*Pleading—Proof.* 18 *Misc.* 10 (75 *St. Rep.* 450; 40 *N. Y. Supp.* 1132); 64 *App. Div.* 486 (72 *N. Y. Supp.* 251).

*Street railways—Use of tracks.* 7 *App. Div.* 314 (40 *N. Y. Supp.* 94).

*Railroads—Presumptive negligence.* 57 *N. Y.* 572; 39 *Hun,* 388; 53 *Hun,* 509 (26 *St. Rep.* 742; 6 *N. Y. Supp.* 309); 85 *Hun,* 169 (65 *St. Rep.* 629; 32 *N. Y. Supp.* 592); 30 *App. Div.* 168 (51 *N. Y. Supp.* 757); 73 *App. Div.* 167 (76 *N. Y. Supp.* 752); 63 *Barb.* 266; 47 *How. Pr.* 259; 10 *St. Rep.* 264.

*Negligence—Prima facie proof.* 23 *App. Div.* 304 (48 *N. Y. Supp.* 349); 29 *App. Div.* 469 (51 *N. Y. Supp.* 727); (35 *App. Div.* 479; 54 *N. Y. Supp.* 818); 80 *App. Div.* 140 (80 *N. Y. Supp.* 266, 267; 12 *Ann. Cas.* 395); 82 *App. Div.* 265 (81 *N. Y. Supp.* 954); 24 *Misc.* 78 (53 *N. Y. Supp.* 395); 4 *Daly,* 184.

*Abnormal causes—Burden of proof.* 95 *N. Y.* 568; 120 *N. Y.* 174 (30 *St. Rep.* 817); 47 *App. Div.* 77 (62 *N. Y. Supp.* 369); 10 *Misc.* 706 (64 *St. Rep.* 635; 31 *N. Y. Supp.* 829); 1 *Sweeny,* 498.

carrying of passengers, yet if the company use it for that purpose, and take fare from the passengers carried, they incur the same responsibilities as in the use of regular passenger cars.

THIS was an action brought to recover damages alleged to have been sustained from an injury received by the Plaintiff while riding as a passenger on the Defendant's cars.

The case shows that the Plaintiff purchased of Defendant a passenger ticket from New York to Albany.

That he rode upon a passenger train as far as Hillsdale, where he got off and remained from Saturday until Monday morning. While upon the train the conductor took from the Plaintiff his ticket, which specified that it was good for one day only, and gave him a check showing his right to a passage upon the train to Albany.

Upon Monday morning the Plaintiff got into a caboose attached to a freight train going to Albany, in which passengers were carried by the company, and fare received therefor.

The conductor called upon the Plaintiff for fare, and he presented the check received by him on the other train.

The conductor at first refused to recognize the right of the Plaintiff to ride in his train upon the check, and demanded payment of fare, which was paid by the Plaintiff.

After a short time the conductor returned the money so paid to the Plaintiff, and permitted him to ride upon the check.

Upon the arrival of the train at the Berkshire crossing, near Chatham Four Corners, the hind part of the caboose ran off the track, while the forward end still ran thereon, and collided with a loaded freight car standing upon another track, and broke to pieces, by which the Plaintiff received the injury.

At the close of the Plaintiff's case the Defendant moved for a nonsuit upon the ground—first, that no negligence of the Defendant, or its employés, had been proved; and second, that the Plaintiff was guilty of negligence in riding upon that train; and third, that he was not a rigtful passenger thereon. The motion was denied, and the Defendant excepted.

At the close of the evidence, the Defendant renewed his

motion for a nonsuit, upon the same ground, which was denied, and the Defendant excepted.

The Defendant excepted to portions of the charge. The questions arising thereon sufficiently appear in the opinion.

The jury found a verdict for the Plaintiff, upon which judgment was rendered, which was affirmed, upon appeal, by the Supreme Court in the Second District, from which the Defendant appealed to this Court.

*Messrs. G. T. Jenks* and *J. Emott* for Respondent.

*Mr. Charles W. Sandford* for Appellant.

GROVER, J.—The only negligence imputed by the Defendant to the Plaintiff was in riding upon the caboose attached to the freight train, where, it is claimed, he was not a rightful passenger.

The case shows that, although the caboose was not properly a passenger car, and was used principally for carrying the employés of the company, yet that passengers were carried thereon, from whom the company received the usual fare.

The company, therefore, incurred the same liability to such passengers for their safety as it was under to passengers upon the regular passenger trains.

As to the Plaintiff's rights as a passenger, there the question is not whether he had the legal right to a passage upon the check he had received on board the other train, but whether the conductor recognized such right instead of payment of fare to him by the Plaintiff.

The Plaintiff had paid his fare to the company for a passage from New York to Albany, and received a ticket as evidence thereof.

This ticket had been taken from him, and a check given as a substitute therefor.

The conductor of the train upon which the Plaintiff was injured at first refused to recognize the right of the Plaintiff as a passenger upon his train by virtue of the check, and demanded and received fare from him. This gave the Plaintiff clearly all the rights of a passenger, and these were in nowise

impaired by the subsequent return of the money received from the Plaintiff, and the recognition of his right under the check by the conductor. These acts were within the authority delegated to the conductor by the Defendant.

There was, therefore, no negligence legally imputable to the Plaintiff.

The evidence showed that the car in which the Plaintiff was riding in part ran off the track and was broken, by means of which the Plaintiff was injured. This was primâ facie evidence of negligence of the Defendant. The latter not only had the entire control of the vehicle, but also of the track upon which it was run, and it owed a duty to the Plaintiff to keep both in a perfect and safe condition for the transportation of passengers with entire safety, so far as human prudence can accomplish these results. Experience proves that when the tracks aand machinery are in this condition, and prudently operated, the trains will keep upon the track, anad run thereon with entire safety to those on board.

Whenever a car or train leaves the track it proves that either the track or machinery, or some portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves that the Defendant, whose duty it is to keep the track and machinery in the proper condition and to operate it with the necessary prudence and care, has, in some respect, violated this duty.

It is true that a bad state of the track or machinery may have resulted from the wrongful act of persons for whose conduct the Defendant is not responsible, and the injury to the passenger may have resulted therefrom, and, in such a case, the company is not responsible; but such cases are extraordinary, and those guilty of perpetrating such acts are highly criminal, and therefore there is no presumption of the perpetration of such act by others, and the company, if excusable upon this ground, must prove the facts establishing such excuse (Curtis v. The Rochester and Syracuse Railroad Co., 18 N. Y. 534, and cases there cited).

The Defendant owed to its passengers the same duty to keep its track at the Berkshire crossing safe, irrespective of the question upon which company the duty devolved, as between themselves, as it did in respect to any other portion of the track.

The complaint contained a general averment that the injury was received from the negligence of the Defendant and its employés, and it is therefore immaterial whether the proof established the particular negligence specified in the complaint, —some negligence being shown.

The motions for nonsuit were properly denied.

The Court charged the jury that the Plaintiff was a passenger, and was not guilty of negligence in being on the freight train; to which the counsel for the Defendant excepted.

This exception, and also that taken to the charge relative to the Berkshire crossing, have been considered in connection with the exception to the denial of the motion for a nonsuit.

The Court further charged: That the Defendant was bound to show and give some explanation of the cause of the accident. That the burden is upon them to show that they exercised the prudence and skill in the preparation of their track and their cars, and in the management of them, demanded by the law. Unless they prove themselves free from negligence, they are liable.

The Defendant's counsel excepted to this portion of the charge.

This portion of the charge must be understood in reference to the facts of this case, and as applied to such facts.

In this view it was not erroneous. The facts showed a primâ facie case of negligence against the company, either in the condition of the track or cars, or in running the train. The charge, in substance, was, that the Defendant must, by proof, answer and retract this primâ facie case against it, and show itself free from the negligence to be presumed from the facts proved by the Plaintiff, or it was liable.

The charge imports nothing more. It does not at all imply

that to entitle the Plaintiff to a verdict it was not incumbent upon him to prove that his injury resulted from the negligence of the Defendant.

The judgment must be affirmed, with costs.

All affirm.

JOEL TIFFANY,
State Reporter.

---

## GEORGE K. ROBERTS, RESPONDENTS, *v.* JOHN W. CARTER AND EDMUND TERRY, APPELLANTS.

*Set-off—Tort Contract—Judgment—Assignment.*

Damages in an action for fraud in obtaining the possession of personal property cannot be set off against a claim for rent.

Where R. was prosecuting an action against C. for such damages, and C. was prosecuting an action against R. for rent, and both actions were referred to the same referee, who, on the same day, reported in favor of each Plaintiff, the Plaintiff C., before judgment was entered on either report, assigned his claim against R., and the report therefor to his Attorney T., in consideration of his indebtedness at that time to T.

*Held,* that this assignment was effectual to prevent a set-off.

Judgment was, by leave of Court, afterwards entered up in the name of T. against R., after which R. entered judgment against C., and commenced this action to compel a set-off of the one judgment against the other. *Held,* that he was not entitled to the set-off.

APPEAL from order of the General Term of the Supreme Court in the First District, reversing a judgment for the Defendant at Special Term, and ordering a new trial.

The facts sufficiently appear in the opinion of the Court.

WOODRUFF, J.—If this case is before us for review upon the pleadings and proofs, as under the former practice, on an ap-

---

*Set-off—Judgments.* 53 *N. Y.* 243; 6 *Hun,* 96; 10 *Hun,* 234; 35 *Hun,* 142; 38 *Hun,* 585; 33 *Misc.* 83 (67 *N. Y. Supp.* 172); 66 *Barb.* 344; 1 *How. N. S.* 365; 35 *Super. Ct.* 261; 3 *Civ. Proc.* 250, 7 *Civ. Pro.* 243; 13 *St. Rep.* 716 (13 *Civ. Proc.* 349).

peal from the decree of the Court of Chancery, I think the order appealed from should be reversed, and the judgment at Special Term affirmed.

The action is brought as a bill in equity to compel the set-off, or application of a judgment, entered in the name of the Defendant Tery against the Plaintiff for $319.43, upon and towards the satisfaction of that amount, parcel of a judgment recovered by the Plaintiff aginst the Defendant Carter.

It appeared on the trial that the two actions in which such judgments were recovered were pending at the same time, had been referred to the same referee, and he reported therein on the same day.

That the action against the Plaintiff was brought by Carter in his own name, the cause of action being a claim for rent; and that, on the day on which the referee made his report, Carter assigned the claim to his attorney, the Defendant Terry, in consideration of his indebtedness to Terry.

The action in favor of the Plaintiff, so far as I can discover from the case, was an action to recover damages for an alleged fraud in the sale of certain personal property.

Immediately after the assignment to Terry, he applied ex parte to the Supreme Court for an order substituting him as Plaintiff in place of Carter, and thereupon, on the 23d of July, 1857, entered up and docketed judgment on the report, in his own name, for $149.17 reported due, and $170.26 costs, amounting together to $319.43.

On the 3d of August following, the Plaintiff perfected his judgment against the Defendant Carter for $820, the amount reported by the referee, and $221.12 costs, amounting together to $1,040.12.

An appeal appears to have been taken from this judgment, and the same was affirmed in General Term, and executions were issued thereon, which were returned unsatisfied in 1859, and thereupon a ca. sa. was issued, on which the Defendant Carter was taken and imprisoned, and so remained at the time when this action was commenced to compel the set-off.

Upon these facts I am not able to perceive that, on the 21st day of July, 1857, when the Defendant Carter assigned his claim for rent to the Defendant Terry, the Plaintiff had any title, legal or equitable, to the set-off which in this action he claims, and if not, then he certainly did not acquire any right after such assignment took place.

At law his right of set-off did not exist. He was sued for money due upon contract. He was suing to recover damages for a tort. As to such claims, no right of set-off existed.

If either party had desired to make such set-off in the actions then pending, it could not be allowed (Code, § 150, notes; 2 Rev. Stat. 354, § 18, subd. 1).

On the day of the assignment no right of set-off existed.

It was only upon the entry of judgment that the Plaintiff came into a situation to claim a set-off, either by motion or by bill in equity, and before that time, the claim of Carter had been assigned, for a valuable consideration, to his attorney, the Defendant Terry. Non constat, at the time of such assignment, that the Plaintiff would recover any judgment.

It may be conceded that Perry took the assigned claim subject to all the equities which then existed in favor of the Plaintiff.

This seems to be the ground on which the reversal of the judgment was placed by the General Term. But at that time no equities did exist, according to any facts proved or found in this case, if the opinion of the Judge at Special Term may be consulted to ascertain what he did find.

He says: "Had the insolvency of Carter, charged in the complaint, been proved, I should now hold the Plaintiff entitled to the set-off on that ground. But, insolvency being denied in the answer, and there being no proof, the Plaintiff cannot have relief on that ground."

If it had been proved, as charged, that Carter, being insolvent, had notice that the referee had or would probably report against him, and had with Terry fraudulently contrived this scheme of assigning the claim, in order to prevent the

exercise of the equitable power of the Court to set off one judgment against the other, a different question might have been presented.

No such facts appear to have been found.

Upon the mere fact that the Plaintiff had obtained a report in his favor, no right, legal or equitable, arose which prevented the assignment to Terry.

In this view it is wholly immaterial whether the substitution of Terry as Plaintiff was regular or not, though I apprehend it was perfectly good until it was set aside on motion for that purpose.

It was the *assignment,* and not the entry of the judgment in Terry's name, which prevented the accruing of any right of set-off.

And the views thus expressed are in nowise inconsistent with the case of Nicoll *v.* Nicoll (16 Wend. 446).

They proceed upon the single ground that, in the absence of insolvency or fraud, the assignment was operative to prevent a set-off against a claim founded in tort, and not in judgment when the assignment was made.

By this I do not mean to say that mere insolvency would make any difference, since at that time the right of set-off did not exist.

I think the conclusion of the Judge at Special Term was correct, and that the order of the General Term should be reversed, and the judgment at Special Term should be affirmed.

Reversed.

JOEL TIFFANY,
State Reporter.

## CATHERINE HINNEMAN AND JACOB HINNEMAN, ADMINISTRATORS OF THEODORE HINNEMAN, DECEASED, v. SAMUEL ROSENBACK.

*Contract—Parol evidence—Explanation.*

When, according to the terms of a written contract between the parties, a part of the payment to be made consisted in an order for five hundred dollars, to be given on Messrs. W. & T.—

*Held,* that parol evidence was admissible to show whether the order was to be for the payment of money, or for the payment of five hundred dollars in sash and blinds, manufactured by said W. & T.

ON the 16th of January, 1861, the Defendant and Theodore Hinneman made a written contract, by which the latter agreed to build a house for the Defendant, which said contract was in the words and figures following:

"This agreement, made and entered into this 21st day of January, 1861, by and between Samuel Rosenback, of the city of Syracuse, county of Onondaga, and State of New York, of the first part, and Theodore Hinneman, of the above-named city, county, and State, of the second part, witnesseth: That the said Theodore Hinneman, party of the second part, for the consideration hereinafter mentioned, doth covenant and agree to and with the party of the first part, to make and build and finish, in a good, substantial, and workman-like manner, on the lot of the said party of the first part, on Jefferson Street in the city of Syracuse, a dwelling-house, agreeably to the plans and specifications, of good, substantial materials; and the said Theodore Hinneman, party of the second part, doth further covenant and agree to finish and deliver the same into the hands of the party of the first part on or before the first day of July next.

---

*Evidence—Parol—Custom.* 19 *Misc.* 287 (47 *N. Y. Supp.* 72).

*Contract—Parol evidence—Explanation.* 94 *N. Y.* 149; 20 *Hun,* 9; 38 *Super Ct.* 438; 26 *St. Rep.* 111 (7 *N. Y. Supp.* 65); 37 *St. Rep.* 397 (13 *N. Y. Supp.* 565).

"And the said party of the first part covenants and agrees to pay unto the party of the second part, for the faithful performance of the same, the sum of one thousand seven hundred dollars, lawful money of the United States, and five hundred dollars in an order on Messrs. Woodruff & Taylor, of Oswego; also a house and lot on the north-east corner of Jackson and Mulberry Streets, in the city of Syracuse, and the house now on the lot on which the party of the first part designs to build. The money to be paid as follows: Five hundred dollars the first day of May next, five hundred dollars the first day of June next, and the balance when finished. The house and lot on the corner of Mulberry and Jackson to be deeded to said Hinneman upon the signing of this agreement; also the house now on the lot on Jefferson Street.

"In witness whereof the parties to these presents have hereunto set their hands and seals, the day and year first above written.

(Signed) "SAMUEL ROSENBACK. [L. S.]
"THEODORE HINNEMAN. [L. S.]

"Signed and delivered in the presence of
"L. E. JOY."

The Plaintiff performed the whole work according to the terms of his contract, and the Defendant paid him the price fixed by the contract, and fully performed, on his part, except the $500 payable in the order on Woodruff & Taylor—the Plaintiff claiming and insisting that the contract entitled him to an order payable in money, and the Defendant insisting on the right to give him an order which, by its means, was payable in sash, blinds, and other joiner-work; Woodruff & Taylor being manufacturers of such articles at Oswego.

Upon the trial of the cause the referee allowed the Defendant to give certain parol evidence, for the purpose of showing that this expression in the contract meant an order payable in the building materials manufactured by Woodruff & Taylor, and not in cash; and the real question in the case is whether this evidence was properly received; and, secondly, whether the referee was right in holding that the true intent and mean-

ing of the contract was, that this order on Woodruff & Taylor should be drawn payable in sash, blinds, &c.

The referee found that such was the true construction of the contract; and as the Defendant had offered the Plaintiff such an order, the referee gave judgment for the Defendant, which was affirmed on appeal to the General Term, and from which judgment the Plaintiff has appealed to this Court.

*W. V. Bruyn* for Plaintiff.
*Wm. C. Ruger* for Defendant.

MASON, J.—I am satisfied, after a careful examination of this case, that the referee committed no error, in admitting the parol evidence to aid in the interpretation of this contract, which can prejudice the Plaintiff, and that he gave the correct construction to this agreement.

The language of the contract itself favors the construction put upon it by the referee. By the terms of the contract, the Defendant was to pay Hinneman, for the construction of his dwelling-house, the sum of one thousand seven hundred dollars, lawful money of the United States, and to convey to him the house and lot on the corner of Mulberry and Jackson Streets, and to deed to said Hinneman, upon the signing of the agreement, the house on the lot on Jefferson Street, and to pay him *"five hundred dollars in an order on Messrs. Woodruff & Taylor, of Oswego."* It is not a reasonable construction of the contract itself to hold that these parties meant a cash draft on Woodruff & Taylor. He was to pay $1,700 in cash, and $500 in an order on Woodruff & Taylor, of Oswego.

The legal definition of an order does not ordinarily mean a cash draft. Bouvier says that "an informal bill of exchange, or a paper which requires one person to pay or deliver to another goods on account of the maker to a third party, is called an order" (Bouvier's Law Dictionary, title "order," 2d vol., p. 257); while a draft or bill of exchange is defined to be "an open letter of request from, and order by, one person on another to pay a sum of money therein mentioned to a third person, on demand, or at a future time therein specified" (1 Bouv.

Law Dictionary, 189). A draft, at the present day, is "the common term for bill of exchange" (1 Burrill's Law Dictionary, 520, title "draft"); and a draft and bill of exchange are used indiscriminately. Edwards says: "The bill of exchange, properly termed a draft, is written in the form of an open letter, directing the person to whom it is addressed to pay the sum of money therein specified to a third person named in the instrument, on account of the writer or person by whom it is drawn" (Edwards on Bills and Promissory Notes, 41; Chitty on Bills, 130, 154).

It must be payable in money (Thompson *v.* Sloan, 23 W. R. 73; Cook v. Satterlee, 6 Cow. R. 708; 5th ed., 186). Not so with an order; the more common definition is that given by Bouvier, as an order to pay goods on account of the maker to a third person. It was only necessary in this case to prove that Woodruff & Taylor were manufacturers of these articles, necessarily used in house-building, to raise a reasonable presumption that it was the intention of these parties that this order should be for such articles, especially as it was proved that these parties knew that such was the business of Woodruff & Taylor.

We cannot shut our eyes to the fact that the Plaintiff was, in this agreement, entering into a contract to build a dwelling-house for the Defendant, where these very materials would be required in its construction; and when we add to this the fact that the Defendant, in the contract, agreed to pay $1,700 in cash, and an order on Woodruff & Taylor for $500, the presumption is very strong that this order did not mean a cash draft on them.

To my mind it is clear. Be this as it may, if the matter was left in doubt, it was certainly competent to remove it by the parol evidence in the case. The rule is a common one, to receive evidence external to the contract in aid of the interpretation of its language. Such evidence, however, cannot be received to contradict or vary the terms of a written contract; and where the instrument has a settled legal meaning, its construction is not open to parol evidence (2 Parsons on Contracts,

63). But where, as in this case, the order may mean a money order, or an order payable in those kind of building materials, there can be no doubt that the interpretation of the language of the contract may be aided by extrinsic evidence showing the intention of the parties in the use of the language in the particular instrument (2 Parson on Contracts, 76).

I am quite inclined to the opinion that it was not competent for the Defendant to prove that he held a note or due-bill, made by Woodruff & Co., payable in these materials.

Its admission, however, affords no ground for granting a new trial; for the case is too clear for the Defendant, without this evidence, to be doubted. If this evidence were out of the case, the finding must have been the same; and were the finding otherwise, it would be erroneous.

The judgment of the Suprme Court must be affirmed.

CLERKE, J. (dissenting).—This action was brought to recover the sum of five hundred dollars, alleged to be due on a building contract: The consideration was expressed in the following words: "And the said party of the first part covenants and agrees to pay unto the party of the second part, for the faithful performance of the same, the sum of one thousand seven hundred dollars, lawful money of the United States, and *five hundred dollars in an order on Messrs. Woodruff & Taylor, of Oswego;* also a house and lot on the north-east corner of Jackson and Mulberry Streets, in the city of Syracuse, and the house now on the lot on which the party of the first part designs to build. The money to be paid as follows: Five hundred dollars the first day of May next, five hundred dollars the first day of June next, and the balance when finished."

All of this consideration was paid except the $500 payable in an on Messrs. Woodruff & Taylor. Woodruff & Taylor were manufacturers of sash, blinds, and joiner-work, at Oswego, and the Defendant held their promissory note for $500, payable in their joiner-work, sash, blinds, doors, &c.

The only question in this case is, whether the sum of five hundred dollars, which the contract stipulated should be paid in

an order on Messrs. Woodruff & Taylor, is payable in currency, or in the work and materials mentioned in the promissory note held by the Defendant at the time of the execution of the contract.

It will be perceived that the contract contains no reference whatever to the promissory note; but the Defendant's counsel contended he had a right to show, by parol testimony, that the parties intended and agreed that this sum should be paid in the manner specified in the note.

Is this a case in which parol evidence is admissible to explain a written agreement? The only ground on which such evidence can be admissible in this case is, that the portion of the agreement stating that five hundred dollars shall be paid in an order on Messrs. Woodruff & Taylor contains a latent ambiguity, or that the terms employed to express the method of payment require a parol explanation to enable the Court to interpret it.

The referee, in his opinion, and the General Term, I think, pronounced it a case of latent ambiguity. But a latent ambiguity, as we all well know, is where the instrument, on its face, is sufficiently certain and free from ambiguity, but the ambiguity is produced by evidence of something extrinsic, or some collateral matter out of the instrument, and it is maintained here that the note of Woodruff & Taylor is the extrinsic or collateral matter requiring parol explanation.

But if the mere existence of another writing raises an ambiguity, within the meaning of the rule, then the general rule forbidding the introduction of parol evidence to explain, vary, or discharge written instruments, will no longer have any practical effect.

The evidence which is said to raise an ambiguity in a written instrument is very different from that furnished by this note. As, for instance, the example given in the books: "If a person grant his manor of S. to one and his heirs, so far there appears to be no ambiguity; but if it should appear on the trial that the grantor has the manors both of South S. and North S., this ambiguity is matter of fact, and parol evidence may be ad-

mitted to show which of the two manors the grantor intended to convey."

Or if, in the case under consideration, it appeared by extrinsic evidence that there were two firms at Oswego of the name of Woodruff & Taylor, and that there was a dispute as to which firm the parties meant, this would raise a latent ambiguity, and evidence by parol would be admissible to explain it.

From the example it is evident that, in case of latent ambiguity, the extrinsic evidence which raises it produces the uncertainty of itself, necessarily and palpably; and all that is left for the Court is to ascertain by parol to which of two or more things the ambiguous language is to be applied. It does not require an assertion or suggestion, much less an argument, that an ambiguity appears.

The extrinsic fact, which, it is alleged, produces the ambiguity in this case, is the existence of a promissory note, made by Woodruff & Taylor, for $500, payable in work and materials. How does this fact produce uncertainty or ambiguity in an instrument which provides for the payment of $500 in the ordinary method? It may, indeed, suggest a probability to the mind, that the latter payment was intended by the parties to be made in the same way as the other.

But we are not speculating on probabilities or improbabilities. In the one case the writing shows that payment was to be made in a peculiar and exceptional manner; in the other, it was to be made in the ordinary manner; and it is gravely maintained that this fact of itself necessarily produces an ambiguity, which admits of parol evidence to prove that the parties, when making the contract, stipulated that the payment should be made in the peculiar and exceptional, and not in the ordinary manner provided for in the written instrument.

When it is provided that a payment shall be made in "dollars," the meaning is manifest. The necessities of social and commercial intercourse, as well as the rules of evidence, require that ordinary words should be understood according to their common and general acceptation.

Consequently, when an order, or bill of exchange, or any writing provides that the payment shall be made in "dollars," it means lawful currency of the United States of America; and an offer to show by parol that the parties meant anything else, is obviously an offer to violate the rule forbidding the introduction of parol evidence to vary or contradict a written instrument.

This is a rule to which the Courts have rigidly adhered from a very early period of judicial history. No rule has operated more beneficially in its general effect. No one disputes that it would be most mischievous to admit evidence to prove that the maker of a written instrument intended something which his language does not express; evidence which, in the language of Wigram (Extr. Ev. 65), "passing by and disregarding the written instrument, seeks to import into and engraft upon it an intention independent of its terms."

The inevitable result would be to impair, if not destroy, the advantages of security which written agreements are calculated to afford. The latest instance of strict adherence to the rule on the subject, I find in Millard *v.* Bailey (1 Law Rep., Eq. 378), decided by Vice-Chancellor Wood in January, 1866.

A testatrix left four children, and a godchild whom she had educated. She had 74 shares in a gas company; originally she had only 37; but by a new arrangement the company; had extended its business, and issued a new share to its stockholders for each original share, making the 74 above mentioned.

She, however, always called them 37—treating each as a double share. She made a bequest, under this idea, to her four children of thirty-three shares, followed by a bequest to her godchild of the "remaining shares," no doubt thinking that the godchild would be entitled only to four of the double shares, or eight single shares, and that her four children would have thirty-three double, or sixty-six single shares.

But the godchild claimed that she was entitled under the will to forty-one single shares. Parol evidence was offered to show that the testatrix was in the habit of treating, and intended to

treat, the shares as double shares, so as to pass to her godchild, by the residuary gift, four double, or eight single, and not forty-one single shares.

The Vice-Chancellor (Wood) held it inadmissible, adding: "However much one may regret the result, I cannot treat the description of these shares in the will as being of double, and not of single shares . . . . I cannot allow particular expressions, said to have been used by this testatrix, to prevail where they are not the general language universally applicable to the particular subject-matter."

The case under consideration does not show a patent ambiguity, and parol evidence should not have been admitted on any other ground.

In this contract there are no terms of art, no technical or foreign words, no ancient words fallen into disuse, which require parol interpretation. It refers to no other instrument; the note of Woodruff & Taylor is not alluded to; it contains nothing of a peculiar sense different from the popular sense of the words which it employs, and these words, as I have before said, must be understood in their plain, ordinary, and popular signification. The word "dollar" certainly has but one meaning, understood of all men.

When, in a promissory note or bill of exchange, or any other instrument, negotiable or not, I promise to pay a certain number of dollars, the plain and ordinary meaning is, that I shall pay the sum mentioned in lawful currency; and to show, by parol, that I undertook to pay it in law-books or in law stationery, would be a palpable violation of the rule, which declares that parol evidence cannot be admitted to contradict or vary the terms of a written instrument.

The judgment should be reversed, and a new trial ordered; costs to abide event.

Affirmed.

JOEL TIFFANY,
State Reporter.

IN THE MATTER OF THE APPRAISAL OF DAMAGES OF PETER TOWNSEND, APPELLANT, FOR LANDS, ETC., TAKEN BY MORRIS CANAL AND BANKING COMPANY, RESPONDENTS.

IN THE MATTER OF THE APPRAISAL OF DAMAGES OF PETER TOWNSEND AND WILLIAM H. TOWNSEND, APPELLANTS, FOR LANDS, ETC., TAKEN BY MORRIS CANAL AND BANKING COMPANY, RESPONDENTS.

*Eminent Domain—Foreign Corporation—Retroactive Legislation—Unconstitutionality.*

An act of the Legislature taking land in this State for a public use is not unconstitutional because the instrumentality employed for that purpose is a corporation created by the laws of another State:

Nor because such corporation derives a pecuniary benefit from the use of the land so appropriated:

Nor because the lands appropriated are to be used for the maintenance of a navigable canal which runs along the border of the State, but without its limits.

If the use be in its nature public, the Legislature are the sole judges of the question whether the benefit to our citizens or to the State is such as to warrant the taking of private property therefor: and are also the sole judges of the question what supervision or control over the use should be retained in order to secure the contemplated public benefits.

But where such lands have been already taken or appropriated without authority, or have been injured by the construction of such canal and a reservoir of water therefor by flooding, &c., an act of the Legislature, authorizing the appointment of commissioners to appraise the damages already sustained, and making their award and the payment or tender of the sum awarded a bar to any action by the owners to recover such damages, is unconstitutional and void.

The party injured has a right to maintain his action and have a trial by jury, and cannot constitutionally be required, by retroactive legislation, to submit his cause of action to a tribunal not proceeding according to the course of the common law.

THIS is an appeal from an order of the Supreme Court for the appointment of commissioners to appraise the Appellants' damages to lands flooded by the erection of a dam to form a reservoir in Greenwood Lake, in Orange county, to feed the Respondents' canal; and from an order confirming the ap-

praisement made by the said commissioners. The Morris Canal and Banking Company was incorporated in 1824, by an act of the Legislature of New Jersey, to "construct a Canal to unite the river Delaware, near Easton, in the State of Pennsylvania, with the tide-waters of the Passaic, in New Jersey."

Another act, passed in 1828, authorized the company "to continue the canal to the waters of the Hudson, at or near Jersey City." The company was authorized to take all land and water necessary for the construction and use of the canal and its feeders, paying a just compensation therefor.

The twenty-fifth section of the act of 1824 provided "that the said canal when completed, shall forever thereafter be esteemed a public highway, free for the transportation of any goods, commodities, or produce whatever, on payment of the tolls." Long Pond, or Greenwood Lake, lies partly in Orange county, in this State, but mostly in New Jersey, where it has its outlet. In 1837 the company built a dam at the outlet, about eight feet higher than the old dam then existing there, in order to form a reservoir and feeder for its canal.

By raising the dam, some of the Appellants' land on the margin of the lake was flooded.

In 1855 an act was passed by the Legislature of New York, authorizing the corporation, in case it could not "agree with the owners of any real estate in this State required for, or which has been injuriously affected by, the construction, maintenance, or use of a reservoir of the said company, formed by a dam across the outlet of the pond extending into the county of Orange, in this State, known as Long Pond, or Greenwood Lake, for the purchase of any such real estate, or for the injury which has been or may be occasioned thereto, by the construction of such reservoir, or by the raising of the dam thereof, or any other works, uses, or purposes connected therewith, it shall be lawful for the said company, their successors or assigns, to acquire title to any such real estate, or to have the compensation for such injury appraised in the manner and by the proceedings hereinafter mentioned" (Laws of 1855, ch. 296, p. 506, § 1). The second section provides that the company may petition the Su-

preme Court to appoint commissioners of appraisal, describing in the petition the real estate, the object for which it is required, etc., and that a copy be served and notice given. Other provisions are made, not material to be stated. A petition was presented for the appointment of commissioners, under the act in question, to ascertain and appraise the compensation to the Appellants for the damages and injuries by the actual overflow and injury to their lands by the erection, maintenance, and use of the dam and reservoir. The Appellant opposed their appointment, on the ground that the act was unconstitutional. The Court overruled the objection, and made an order for that purpose in February, 1856, and on appeal the order was affirmed. Commissioners were appointed, and proceeded and made a report for damages, the Appellant not appearing. The report was presented for confirmation, which was opposed on the same ground, and confirmed. The Appellant appealed to the General Term, where the order was affirmed in May, 1863, and the Appellant appealed to this Court.

*J. Larocque* for Appellants.
*Joshua M. Van Cott* and *David F. Gedney* for Respondents.

WOODRUFF, J.—That the State may, in virtue of its right of eminent domain, take private property for public use upon making compensation therefor, is not questioned on this appeal.

That, for the ascertainment of such compensation, where it is not paid by the State, in all cases (except the case of "private roads") it is competent to proceed by application to the Supreme Court, and the appointment of three commissioners to be appointed by that Court to determine the same, is not and cannot be disputed (Const., art. 1, § 7; Act of April 11, 1855; Sess. Laws, ch. 296, p. 506).

It is far too late in the history of legislation and of adjudication in this country and in this State to claim that private property may not be taken for what are, in common parlance, called "public improvements," such as railroads and canals, with their incidental and reasonable conveniences and appurtenances, notwithstanding the work is done by individuals or a corpor-

ation, who are to derive a pecuniary benefit therefrom, if the Legislature deem it for the public interest (Bloodgood *v.* Mohawk and Hudson Railroad Company, 18 Wend. 9).

If, then, the use is public, and the power to take and appropriate may be conferred upon individuals or corporations, I know of no restraint upon the Legislature in the selection of the parties to whom the power to take and apply shall be delegated. Certainly the Constitution contains neither prescription nor limitation. It is clear, I think, and has been so uniformly held ever since the case above referred to, that as to the instrumentality employed, and the manner in which the property shall be taken and applied to the public use, the Legislature are the sole judges. Their supreme power over the subject is qualified only by the three particulars:—the use must be public; compensation must be given; the amount required as compensation must be ascertained by a jury, or by not less than three commissioners appointed by a Court of record.

It has, indeed, been said that the right of eminent domain implies the right in the sovereign power to determine the time and *occasion,* and as to what particular property it shall be exercised (Heyward *v.* The Mayor, 7 N. Y. 325). This can hardly be supposed to import that the Legislature can, by its mere declaration, override the Constitution; that, by declaring the use to be public, when it is, within the Constitution, a private use, it can authorize the property of one citizen to be taken from him and given to another, for a compensation to be ascertained in the manner above stated; but only that where the use for which the property is desired is, in its nature, public, the Legislature are the supreme and final judges of the question whether the public necessity or benefit is such as to call for the exercise of the power; whether the time is a fitting one; what particular property may be taken, and in what manner, in respect to the instrumentalities to be employed for the purpose, —whether State offiicers, individuals, or corporations. All these are purely matters of discretion, within the exclusive cognizance and jurisdiction of the Legislature, and in those mattters I apprehend no Court can review its action.

There is nothing, then in the Constitution that requires that the right to construct a railroad or canal, or other public work, shall be conferred, and only conferred, upon our own citizens, or upon a corporation organized for the purpose, or upon a corporation specially created by the Legislature itself. That is subject to legislative discretion.

Nor is there anything in the Constitution which prescribes what control over the subject, after the appropriation to the public use, the Legislature shall retain to itself, in order to secure the contemplated public benefits. That is left to the wisdom of the Legislature. There are general rules of law which may be invoked to prevent abuses, even though the use be not guarded by any express reservation of visitorial powers.

In this view there is no constitutional inhibition which restrains our Legislature from exercising the right of eminent domain, and condemning land to the public use, and employing, as an instrument to carry the appropriation to the public use into effect, an individual or a copartnership of individuals residing in this or in another State, nor from, in like manner, employing a corporation created by another State for the like purpose.

The example cited to us, in which the New York and New Haven Railroad Company, incorporated by the State of Connecticut, are authorized to construct their railroad through Westchester county, is an illustration, the legality of which cannot, I think, be questioned. And instances might be multiplied in which railroads have been constructed in part through or in States other than the State of their incorporation.

The act of our Legislature authorizing such corporations to do the act, not only recognizes their legal existence, but, per se, makes them, in contemplation of the laws of this State, corporations pro hac vice; and their acts, done in pursuance of that authority, will be, not by *comity* alone, but by *law,* corporate acts.

What precautions shall be adopted to secure the appropriaiton of the property to the sole purpose intended, what security this State shall have against abuses, and what supervision the

State shall retain over the acts of such grantees, if any are needed beyond the ordinary jurisdiction and power of our Courts, the Legislature has sole and conclusive power to determine.

If any question discussed on this appeal, relating to the power of the Legislature to authorize the Respondents to take lands in this State for their reservoir, remains, it is whether this Court can say that taking lands along the shore of Long Pond, in the sense in which it was authorized by the act, viz., by flooding it in the making of such pond or reservoir for supplying the Respondents' canal, is taking private property for a public use?

The Respondents' canal runs from the Delaware River, in New Jersey, to the Hudson River, at a point opposite our chief commercial city, New York. In its course it passes near our southern border, and for its supply a reservoir is needed, which requires the basin of Long Pond, a portion of which is within our State, and the employment of which, by raising the water, appropriates some lands around its shore.

If the canal itself came within our limits, it would be doubtful, according to the views I have expressed, that the Legislature could authorize its construction, and the taking of lands for the purpose; and, in that case, the construction of the reservoir for its supply would be no less within the power.

It does not follow, because the canal is outside the State limits, that its construction and maintenance are not for a public use, within the meaning of our Constitution. If it were within our limits, what are the public benefits to result from its construction? Not merely that our citizens may use it for transportation or travel. Providing transportation to market and facilitating intercommunication are some of the public purposes of such improvements; but communication between our chief cities and the productive regions which lie outside our State, and intercourse with those who dwell there, are as truly objects of public interest and advantage as between two sections of the State itself. Besides, the Court cannot say that the Morris Canal does not run within the reach of a portion of

our own citizens, and directly aid them in the conduct of their intercourse with our eastern border, or the counties along the Hudson River, to which it runs.

The work promoted belongs to a class long recognized as public in its character; and I think it was for the Legislature to say whether the benefit to result to our own citizens, by facilitating internal commerce for the promotion of our trade or otherwise was sufficient to call for the exercise of the power to take private property therefor; and that the decision of the Legislature on that point is not subject to review in this Court.

There is, however, another question which involves much greater doubt.

It apeared by the act of 1855 (Sess. Laws of 1855, ch. 296, p. 506), under which these proceedings were had, that the Respondents had already, in whole or in part, made the construction which wrought damage to lands in this State. It appears by the petition herein that the lands of the Appellants had actually been flooded for years before the act in question.

The act provided not merely for the taking of land for the purposes of said reservoir, but for making compensation for the damages theretofore done without authority.

It provided for an application to the Supreme Court for the appointment of commissioners, and an ascertainment and determination by them of the compensation which ought justly to be made by the Respondents . . for the taking of such real estate, in case the same shall be taken, or for the injury *which may have been* or shall be occasioned thereto by such reservoir or construction, . . in case such injury is sought to be appraised. And the payment, tender, or deposit of compensation, so ascertained, is declared to vest in the Respondents the title to the real estate taken; and, in case the said compensation shall have been made for damages to, or for injuriously affecting, any real estate as aforesaid, then such persons who have been made parties to the proceeding shall be barred from all claim or demand on account of injury or damages to the real estate so injuriously affected, and the Respondents are discharged from

all claim or action on account thereof, and of any matter specified in the said petition.

In this case the Respondents' petition states the erection of the dam to create the reservoir; the actual overflow and injury to the lands of the Appellants; that they are now overflowed and injuriously affected by means of the erection, maintenance, and use of the dam and reservoir aforesaid; that the use and occupation of said lands and premises has been, from the time of the erection of said dam, and now is, in good faith, required by your petitioners, for the maintenance of said reservoir, and the necessary works, uses, and purposes connected therewith, and is, in good faith, intended to be so used; that they have offered the Appellants a fair compensation for all the damages and injury to said lands and premises, and have endeavored, but are unable, to agree with the Appellants for the said damages and injury. And the prayer of the petition is for the appointment of commissioners "to ascertain and appraise the compensation to the owner of said lands and premises, for the damages and injuries aforesaid."

The report of the commissioners recites their appointment "to ascertain and appraise the compensation to said Peter Townsend, for the damages and injury to the lands described in the petition in this matter;" and they report that "we have ascertained and determined the compensation which ought justly to be made by the said Morris Canal and Banking Company to said Peter Townsend, for the damages and injury aforesaid, and we hereby appraise the same at the sum of $140." The order appealed from confirms this report.

The proceedings in the matter of Peter and William H. Townsend are of the same purport.

Here is, obviously, no taking of the lands with intent to vest the title in the canal company. It is simply an ascertainment of the damages done to the lands of the Appellant. It does not profess to be a proceeding to determine the compensation to be made "for the taking of such real estate," but "for the in-

jury . . occasioned thereto by such reservoir," in a case in which "such injury was sought to be appraised," according to the language of section five of the statute.

A liberal construction of the proceeding, in connection with the act under which it was had, with a just regard to the design and purpose of the act and the proceeding under it, may warrant the holding, that this assessment of damages covers all future or prospective injury resulting from the overflow by reason of the dam, as then constructed, although the language of the prayer and of the report is especially apt to describe damages already sustained.

Hereupon, the inquiry arises: Is it within the constitutional power of the Legislature to deprive the Appellant of a right to sue for and recover his damages for an unlawful overflowing of his lands by the act of another—compel him to submit to the award of three commissioners appointed to view the premises and hear such proofs as the parties may offer, or be barred of his claim and right of action for the injury?

In the erection of the dam and the flooding of the lands of the Appellant, the Respondents were wrong-doers. No authority derived from the State of New Jersey was a justification. The cause of action was complete, and the right of recovery for the damages absolute. How then could the Legislature deprive the Appellant of his resort to the ordinary Courts of Justice for redress? If the Respondents would not, or did not, make compensation for the wrong, he was entitled to appeal to the Courts of common law and have his damages assessed by a jury. No public *use* existed for which those damages were properly a subject of condemnation and appropriation under the power to take private property for public purposes. As to the future, the power to authorize the construction of the reservoir may involve the power and duty to provide for the consequential damages, and for their ascertinment by a summary proceeding, although the title to the land was not taken.

The claim of the Appellant, and his cause of action, was one to which the right of trial by jury, "in all cases in which it has

been heretofore used," was especially appropriate, and such trial in such cases is guaranteed by the Constitution.

If the Respondents saw fit to commit the wrong, instead of waiting for legislative authority to construct their reservoir, they became liable for damages, for the payment of which they could not be relieved by any retroactive legislation, and for the ascertainment of which the Appellant could not be compelled to submit to the appraisal of a tribunal not proceeding according to the course of the common law.

So far, then, as the act in question provided for a summary proceeding, to ascertain the damages sustained by a prior wrong, or illegal overflow of the lands of the Appellant, and barred him of any action for redress, I think it was unconstitutional and void.

If it were possible to say upon these proceedings, that the damages awarded were not for past injury, or to sever the damages, distinguishing between the past injury and the future use, there might be opportunity to declare the proceeding valid in respect to the right to continue the erection, and effective as a protection against actions for any damages accruing after payment or tender of the sum awarded.

But, as a bar to an action to recover the prior damages, the proceeding canot avail, and it is our duty so to declare.

The case of Wynehamer *v.* The People (13 N. Y. 378), holds that where no discrimination is made, in the statute auauthorizing the destruction of intoxicating liquors, between property which was already owned (and could not be destroyed without violating the Constitution) and property thereafter manufactured or purchased, the act must be declared unconstitutional and void (The People *v.* Haws, 37 Barb. 440; Taylor *v.* Porter, 4 Hill, 140.)

It follows that the order or judgment appealed from must be reversed.

MASON, CLERKE, GROVER, and DWIGHT, J.J., concurred.

MILLER, J. (dissenting). The principal and most important question which lies at the foundation of this case, and upon

which must be determined, is, whether this Legislature possess the constitutional power to authorize the taking of private property for the use of a foreign corporation, organized by the laws of an adjoining State, and located within the borders of that State, upon the payment of a just compensation to the owner of the property thus taken.

This involves the right of eminent domain, by which the people, in their sovereign capacity, have a right to resume the possession of property in the manner directed by the Constitution and laws of the State, whenever the public interest requires it, upon payment of just compensation (Constitution of New York, art. 1, § 6; Constitution of U. S., Amendments, art. v.). The use must be for the public, and the compensation must be just, to authorize the Legislature to exercise this right. This inherent right, which is one of the attributes of a sovereign and independent State, does not confer upon the sovereign power the privilege of taking the property of a citizen and transferring it to another, or to a corporate body, when the public interest does not require such an act, but is maintained upon the great principle that the interests of individuals must yield to the public wants and necessities. The right of eminent domain has been upheld in this State by a long series of adjudications, and it has been decided that, in cases of public improvements, where benefit would result to the public, it may be exercised either through the agents of the Government, or through the medium of corporate bodies, or by means of individual enterprise (Beekman *v.* Saratoga & S. R. R. Co., 3 Paige, 45, 72, 73; Varick *v.* Smith, 5 id. 137; Bloodgood *v.* M. & H. R. Co., 18 Wend. 60, 77; The People *v.* Smith, 21 N. Y. 595; Buffalo and N. Y. R. R. Co. *v.* Brainard, 5 Seld. 106; The People *v.* The Mayor of Brooklyn, 4 N. Y. 419). The Legislature, as a general rule, is to determine when public uses require the astumption of private property, and unless it entirely exceed its authority, the discretion which it has exercised is not the subject of judicial review. It cannot take property from one man and give it to another, or vacate a grant under pretext of public

use, and any such arbitrary exercise of power would be an infringement upon the spirit of the Constitution, and beyond the powers delegated to the Legislature by the people (2 Kent's Com. 340; Hayward *v.* The Mayor of N. Y. 3 Seld. 324, 5. Seld. 109; The People *v.* Wynehamer, 13 N. Y. 378; Bank of Rome *v.* The Village of Rome, 18 N. Y. 38; People *v.* Toynbee, 2 Park. 490. See also authorities above cited).

The canal of the Respondents is recognized in its charter as a public highway, free for the transportation of goods, and, in the act in question, as a foreign corporation, and terminates at Jersey City, directly opposite the city of New York.

The act under which the proceeding under review was instituted (S. L. of 1855, chap. 296) does not, as seems to be supposed, and as is claimed by the Appellant's counsel, delegate the right of eminent domain to the Respondents, but it is the exercise of that right by the Legislature, which in its wisdom assumes to take the property in question, and appropriate it for certain purposes specified in the act, which it declares to be for "public use."

When the Legislature thus authorizes a corporation to take private property within the State, it does not delegate its power, but it exercises the power in the same manner as has been frequently done in reference to railroads and other corporations within the State.

The true question which we are called upon to decide, then, is not whether the Legislature delegated the right of eminent domain to a foreign corporation, but whether the property of the Appellant was taken for public use, within the spirit and meaning of the provision of the Constitution which has been cited. The term "public use" evidently means for the benefit of the public, and if the corporation who was authorized to take the property had been organized within this State, there would be no question as to the authority of the Legislature to pass the act in question. Nor do I think that it changes the aspect of the case if it appears that the canal of the Respondents can be used and enjoyed by the citizens of this State, or for their bene-

fit. As we have seen, it terminates directly opposite the city of New York, the great emporium of the American continent, where concentrates not only the internal trade and business of all the States in the Union, but, to a considerable extent, the trade and commerce of the whole world.

It has the most important business relations with the nearest as well as the most remote parts of the country, and from all these pour in the products and the fruits of the industry of the country, to add to its prosperity, and to increase the wealth of its citizens. Every avenue opened for the accommodation of those who may have occasion to contribute to its augmenting inland trade, or that facilitates the transportation of the vast amount of merchandise which is disposed of within its precincts, or the entrance or departure or those who may have occasion to visit or to leave it, is of a paramount importance.

Every business man and every owner of property in this great mart is, therefore, interested in maintaining, preserving, extending, and increasing conveniences for inter-communication, and for transportation. Every railroad and canal, and every means of conveyance or communication, furnished by private capital or public enterprise, must increase its means of producing wealth and the value of the property located within its limits. The railroad in Connecticut, which, by the act of the Legislature of this State, is allowed to extend its constructions and operation beyond State limits; the railroads which cross the State of New Jersey, and which are only separated from it by the flowing waters of the Hudson; the canal of the Respondents, which is similarly situated, all contribute benefit and advantage to the city, and to the whole State, and whole country. Can it be said that either of these means for the promotion of internal commerce, and the advancement of commercial prosperity and the good of the whole country, which every citizen is entitled to use and none are deprived from enjoying to the fullest extent, are merely corporations entirely private in their character, and of no earthly benefit to the public at large? That they only benefit individuals, and not the public, because

a narrow and invisible boundary-line separates them from the State of New York? They are not organized for private purposes alone. They are not limited and confined to individual use. They are open and free to all, and the whole public are entitled to enjoy their benefits and privileges. They are instituted, designed, carried out and employed for *public use*. It matters not that a boundary-line separates their immediate connection; and it would be a narrow and limited construction to hold that this fact prevents their being appropriated and dedicated to the public use. They are quite as much for the benefit of the public, and for the public use, as the great works of internal improvement which individual capital and the public authorities of the State have planned, constructed, and brought to a successful consummation within the borders of the State. The railroads that connect New York with Massachusetts, Rhode Island, and Connecticut, and other great States which surround New York, are all part of a great system of internal communication, which, stretching across a vast and extended territory, binds the whole continent together in the bonds of successful enterprise.

To say that the vast channels for trade, commerce, traffic, travel, and enjoyment, are not for the public use of the people of the State, when they meet upon its borders, and accommodate the public at large, is to hold adversely to all rational rules of interpretation applicable to questions of such a character.

Suppose the depot of the Morris Canal Company had been erected immediately across, and adjoining the boundary-line of the State of New Jersey, and within the limits of New York; could there be any doubt that the land taken for such a purpose would be for the public use? Most certainly there would not. It does not, then, alter the case because the Hudson river separates the terminus of the canal company from immediate connection with the State of New York. It accommodates the citizens of New York precisely as much, and the public are equally benefitted and as much interested, as if the depot was located on the opposite side of the river; and it is quite as much

for the public use; nor is it essential, in my opinion, that the canal should be located within the borders, or that the company should derive its power by means of the Legislature of the State of New York, to establish that it is for the public use. It is sufficient that the citizens of this State are entitled to enjoy and derive benefits and advantages from its operations.

It may also be observed, in this connection, that it has been heretofore the policy of the State of New York, through its Courts and public authorities, to recognize foreign corporations; to allow them to prosecute their business, and, in some instances, to grant to them extensive privileges.

With this view, at least one railroad, incorporated in another State, has been extended by direct enactment, and at least another one, similarly organized, has been allowed to extend its line of communication by a separate charter. The same privilege has been conceded by the State of New Jersey to New York, in one instance, if no more. The rules of comity demand thus much, and it would be an unwise and narrow-minded policy for a sovereign State, like New York, to refuse to extend to the corporation of a sister State, which is contributing to its welfare, and from which it is deriving a direct advantage, the trifling boon conferred by the act in question.

It should not be refused, except upon the clearest conviction that it is unwarranted, unauthorized, and in conflict with a constitutional enactment. In any aspect in which the question may be considered, I am of the opinion that the Constitution has not been violated by the general scope and purpose of this act.

The provision of the act vesting titles in real estate in the company "for the purposes of its incorporation," and divesting all persons who have been made parties to the proceedings from any interest in the real estate, "during the corporate existence of said company," etc., I am inclined to consider as an appropriation for *corporate* purposes only. The title of the act, and its provisions, indicate very clearly its object; and when the land taken ceases to be useful or available for such a purpose, the parties whose rights have been acquired would occupy

the same position as any other owner of real estate which had been taken, by the exercise of the right of eminent domain, for public improvement.

Conceding, however ,that this view of the subject is entirely erroneous, yet, the Legislature having the right to take property under the Constitution, the extent of the interest in the land authorized to be taken must, I think, rest very much in its sound discretion

The point taken, that the act is unconstitutional because it purports to authorize the assessment of damages which have been sustained prior to its passage, cannot, I think, be maintained. These damages are so intimately identified with the property, that it is difficult to discriminate between the two. But, admitting that the owner of the land could not be deprived of a right to a trial by jury for antecedent damages, it does not in any way impair the right to appoint commissioners to appraise the damages for taking the land. If the provision of the act was void as to damages previously accruing, it does not affect its validity in other respects. No question is made by this appeal as to these damages, and it nowhere appears distinctly that the commissioners included any such damages. If they did so without authority, and in violation of any provision of the Constitution, I think that the Appellant could have sustained an action for such damages as could properly be recovered, and while the proceedings had would be valid and in force as to the taking and appropriation of the land, which is authorized by the Constitution, they would be ineffective beyond this. The Appelant could not, therefore, be injured by sustaining the proceedings of the General Term.

No other questions are made which require discussion, and the order of the General Term must be affirmed.

Judgment reversed.

JOEL TIFFANY,
State Reporter.

## SMITH KELLOGG, RESPONDENT, *v.* JOHN M. ADAMS ET AL., APPELLANTS.

*Mortgage—Validity—Usurious Agreement.*

Where Plaintiff takes an assignment of a bond and mortgage given for four thousand dollars, and on which three thousand dollars had been advanced by the mortgagee, and pays for the same, to the mortgagee, said sum of three thousand dollars, and by a usurious agreement agrees to advance the remaining one thousand dollars—*Held,* that the usurious agreement did not extend to the three thousand paid to the original mortgagee for the mortgage, and that the assignee could maintain his action to foreclose said mortgage to the extent of the three thousand dollars.

THIS was an action to foreclose a mortgage given by the Deendant Adams to one Lampson, June 1st, 1857, for $4,000, payable in six months.

The mortgage was in fact given only to secure future advances to be made, and liabilities to be incurred by Lampson, which never exceeded $3,000

They amounted to that sum on the 29th day of June, 1858, at which time Lampson declined to make any further advances, and was about to enforce his mortgage for those already made.

On this emergency Adams, who wanted further accommodation applied to the Plaintiff for aid, and it was arranged between them that the Plaintiff should obtain an assignment of the mortgage from Lampson for the nominal consideration of $4,000, paying him the $3,000 due him, and should advance the remaining $1,000 to Adams, and should forbear payment of the whole $4,000 for five years—interest to be paid semi-annually; and this was to be done on the condition, then imposed by the Plaintiff, and agreed to by Adams, that Adams should purchase from the Plaintiff a piece of real estate in the village of LeRoy, known as the Howe property, worth $1,000, for the price of $2,000, which sum, with the addition of $50

*Contract Validity—Usury.* 84 *N. Y.* 633; 6 *Hun,* 639; 14 *Hun,* 539.

bonus for procuring the money paid to Lempson, was to be secured by Adams's bond, with surety, and mortgage on the Howe property; all this was done as agreed. The Paintiff paid Lampson $3,000, and took an assignment of the mortgage in suit, in the name of one Prouty, whose relation to the transaction was merey nominal, and advanced $1,000 to Adams, while Adams took the deed of the Howe property and gave the Plaintiff his bond and mortgage, with surety, for $2,000.

The Judge at the Special Term found that the agreement between the Paintiff and Adams was usurious, but that the mortgage in suit being a valid security in the hands of Lampson for $3,000, the Plaintiff, by his purchase thereof from Lampson, acquired a valid title thereto, and the Plaintiff had the usual judgment of foreclosure and sale for the $3,000 and interest.

The judgment was affirmed at the General Term, and the Defendant Adams, the mortgagor, and other Defendants, judgment-creditors, appeal to this Court.

*George F. Comstock* for Appellants.
*J. H. Martindale* for Respondent.

DWIGHT, J.—The agreement and transaction between the Plaintiff and Adams being usurious, the question is, did it invalidate the title of the Plaintiff to the mortgage assigned to him by Lampson? I answer no. That mortgage was valid at its inception for such sums as Lampson should advance to Adams upon it. On the 14th day of August, 1858, it was valid in Lampson's hands for $3,000 actually advanced, and on that day it was assigned by Lampson to the Plaintiff for the amount then actually due. What circumstance has intervened to invalidate this security in the Plaintiff's hands?

On the part of the Defendants it is answered, that the usurious loan of the additional $1,000 to Adams is part of an entire transaction, with the assignment by Lampson to the Plaintiff, and that its vice vitiates the whole; and counsel truly say, "usury, like fraud, taints every portion of the contract into

which it enters, and the law makes no distinction between parts of an entire contract."

But these familiar rules fail of application to the case in hand, because here the usury did not enter into the contract of assignment; nor were the usurious loan and the assignment of the mortgage parts of the entire contract.

They were not separable, merely; they were absolutely separate and distinct; they were between different parties—the contract for the usurious loan between the Plaintiff and Adams, and that for the assignment of the mortgage between Lampson and the Plaintiff; and the answer to the question propounded by counsel for the Defendants, as the true inquiry in the case, viz.: "Whether Lampson assigned the mortgage to the Plaintiff upon an unlawful agreement between the Plaintiff and Adams," must be fatal to their position. For, certainly, he did not assign his mortgage upon any agreement between other parties, but upon an agreement of his own making with the Plaintiff.

He was asking for his money on the mortgage, and, we may suppose, was ready to assign it to anybody who would pay him what was due. The usurious contract with Adams was doubtless the inducement for the Plaintiff to take the assignment, but it did not induce the assignment by Lampson, who, so far as appears, was not only uninfluenced by it, but ignorant that such contract existed.

I am wholly unable, on principle, to see how the Plaintiff's title to the mortgage can be effected by the unlawful contract with Adams, and the authorities cited on the part of the Defendants do not sustain their position. Two cases especially relied upon are Schroeppel *v.* Corning (5 Denio, 236), and Johnson *v.* Bush (3 Barb. Ch. 207). In the former of these it was held that the assignment and delivery of certain bonds and mortgages, from the borrower to the lender, as part of the consideration of a usurious loan, conveyed no title to the assignee, and that his possession of the property was tortious from the beginning. So, in Johnson *v.* Bush, the assignment

of the bond and mortgage was from a corporation to one of its stockholders, in consideration of a surrender by the stockholder to the corporation of a portion of the capital stock for cancellation—an act expressly prohibited by statute. In both of these cases the contract of assignment was between the same parties as the usurious or illegal contract, and was distinctly a part of that contract, and by this essential characteristic both are distinguished from the case now under considertion.

In the cases of Dewitt *v.* Brisbane (16 N. Y. 508), and Talmage *v.* Pell (3 Seld. 328), also relied upon, the assignments were merely collateral to an illegal contract, and were void for that reason. In this case, had the Plaintiff taken the assignment of Lampson's mortgage as collateral to the usurious contract,—had the Plaintiff loaned the whole $4,000 to Adams, and the latter had paid Lampson his $3,000, and procured him to assign his mortgage to the Plaintiff as collateral to Adam's undertaking to repay the usurious loan,—it is clear that the assignment must have been void, within the principle of the two cases last mentioned. But such was not the contract here. The assignment to the Plaintiff was absolute, and for a consideration unconnected with the usurious loan.

I am therefore clearly of opinion that the assignment from Lampson to the Plaintiff was not affected by the vice of the usurious contract, and that the Plaintiff's title to the mortgage is valid for the amount for which it was valid in Lampson's hands, viz., the $3,000 and interest.

The attempt to make it cover the additional $1,000 fails, for two reasons: first, because it was in fraud of the holders of subsequent liens; and second, because the loan of the $1,000 was usurious.

The judgment of the General and Special Terms should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

# JOHN WOLF *v.* THE SECURITY FIRE INSURANCE COMPANY.

*Insurance Policy—Assignment—Consent of Insurer.*

To take advantage of the want of authority on the part of one assuming to act as agent for another, on the trial of a cause involving the question of authority, the defect or want of authority must be so pointed out that the other party may have notice of the defect he is called upon to supply.

When no such exception has been taken on the trial, the question of authority cannot be raised on appeal to this Court.

The condition in a policy of insurance, avoiding the policy if the property insured is sold without the consent of the underwriters, does not apply to a stock of goods kept for sale.

THIS was an action on a policy of insurance upon a stock of watches and jewelry in a retail store, issued to John Engleheart. The Plaintiff secured a verdict. The General Term affirmed the judgment thereon, and the Defendants now appeal to this Court.

The policy was dated April 18, 1860, and was issued by Owen Gaffney & Co., as the agents of the Defendants. On the 16th of May, 1860, Engleheart sold and transferred the insurred property to one Stupp, who immediately thereafter transferred the same to Margaretta, wife of John Engleheart. In July, 1860, Gaffney & Co. gave a written consent to the

---

*Insurance—Stipulations.* 93 *N. Y.* 506; 18 *Misc.* 217 (75 *St. Rep.* 904; 41 *N. Y.* 509.)

*Insurance—Subject of—How determined.* 3 *App. Div.* 68 (38 *N. Y. Supp.* 988).

*Insurance—Forfeiture—Consent—Waiver.* 46 *N. Y.* 531; 55 *N. Y.* 512; 61 *How. Pr.* 148; 1 *Sweeny,* 221.

*Insurance—Sale—Consent—Effect.* 40 *How. Pr.* 396.

*Objections—Raising first time on appeal.* 3 *T. & C.* 13.

*Husband and wife—Contracts between—Validity...* 44 *N. Y.* 301.

transfer of the interest of John Engleheart in the policy to Margaretta. On the 10th of July John executed to Margaretta a formal transfer of all his right and interest in the policy. On the 30th of March, 1861, the property was partially destroyed by fire.

*Wm. Allen Butler* for the Appellants.
*J. C. Cochrane* for the Respondent.

HUNT, Ch.J.—The Defendants object to the evidence that the company assented to the transfer to Margaretta, for the reason that it did not appear that Gaffney & Co. had authority to bind the Defendants by the execution of such a paper.

It is unnnecessary to examine the question whether Gaffney & Co. were authorized to give this consent. It was given in evidence on the trial as the act of the Defendants, and passed, and was acted upon throughout the trial, as the act of the Defendants, by these their agents. The Defendants raised no question of the authority, but themselves assumed it to have been executed by their duly authorized agents, based their other objections, and asked for numerous rulings and charges, upon the assumption of the sufficient authority of Gaffney & Co. To obtain in this Court any benefit from this defect of authority, it is necessary that the Defendants should, on the trial, have pointed out the defects specifically, and so precisely that the other party would have known what was the defect he was called upon to supply. This the party entirely failed to do. It is evident the objection is one raised by counsel after the trial had been disposed of on other grounds. It cannot be considered here (Binsse *v.* Wood, 37 N. Y. R. 526).

The Defendants further insist that the sale or transfer of the property to Stupp, and then to Mrs. Engleheart, was without the consent of the Defendants, and avoided the policy. The condition in a policy of fire insurance avoiding the policy in the event of a sale of the property by the assured, does not apply to a stock of goods kept for sale. It has been repeatedly held that the assured may sell and replace his entire stock, as

often as his own interest may require, and that the policy protects whatever goods may chance to be on hand when a fire occurs (Hooper *v.* Hudson River Fire Ins. Co., 17 N. Y. 424; 1 Ph. Ins. § 491 ; Angel on Ins. § 203).

The policy in question was of that character. When the sale was made to Stupp, the interest in the property and the interest in the policy became separated. While this separation continued, the operation of the policy was suspended, and if a loss had then occurred, no money could have been had. Engleheart could not have recovered, because he had no goods covered by the policy. Stupp could not have recovered, because he had no policy to cover his interest in the goods. But the moment the interest should again become united, by the union of the ownership of the goods and the interest in the policy in the same person, the policy would again become effectual. If Engleheart had bought other goods, the policy in his name would have covered them. If Stupp had procurred the policy. he would have had its benefit as an insurance upon the original property. This union took place in favor of Mrs. Engleheart when, on the tenth day of July, 1861, her husband transferred to her, with the consent of the company, all his interest in the policy, she having previously secured from Stupp a transfer of the property originally embraced in it. These views are fully sustained by Hooper *v.* Hudson River (sup.). The same case decides that the request that the company would consent to an assignment, was a sufficient notice to them that the party making it had acquired, or was about to acquire, some interest in the goods insured, and was a compliance with the condition of the policy on that subject.

The Defendant, on his motion for a nonsuit, objected, as he now does, that the assignment from Engleheart to his wife was void, on the ground that husband and wife are incompetent directly to contract with each other. While this legal rule may be abstractly true, it is subject to so many exceptions, and it is so well settled that the wife's equitable interest will be fully protected, that the Defendant can derive no great ad-

vantage from it (Borst *v.* Spelman, 4 Coms. 284; Winans *v.* Peebles, 32 N. Y. 423; Liv. *v.* Liv., 2 John. Ch. R. 537; 2 Kent's Com. 163, 166).

The Defendants cannot now interpose this objection without a violation of good faith. They agreed to this assignment in July, 1861, and the parties on all sides acted upon it as valid, the Defendants enjoying the full amount of the premium until the occurrence of a loss. The Defendants should have discerned the invalidity of this assignment when their assent to the transfer was asked, and have made their objection while there was opportunity for the other party to correct the proceedings, or to obtain an insurance in some other company. We have repeatedly held that insurance companies, in such matters, must exercise the most complete good faith, and this is a fair case in which to apply the same principle (Hartshorne *v.* Union M. Ins. Co., 36 N. Y. R. 178; Sohns *v.* Rutgers Fire Ins. Co., March, 1867).*

Judgment should be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

* 2 Transcript Appeals, 227.

## HIRAM CUTISS, RESPONDENT, *v.* THEODORE P. HOWELL, APPELLANT.

*Construction of Contract—Fraud—Rescission—Evidence—Explanation.*

Under a contract to deliver a thousand tons of ground bark per year, for five years, the party has the whole of each year to deliver the one thousand tons for that year—that is, the promisor is entitled to the whole year in which to make the payment.

When, from the language of the contract, there can be no uncertainty as to its meaning, evidence is not admissible to explain the contract.

THIS action was brough by the Plaintiff to recover damages for the alleged breach by the Defendant of a contract in writing, dated April 20th, 1854, by which, as modified by another written agreement, dated February 10th, 1855, the Plaintiff agreed to sell and deliver to the Defendant one thousand tons of ground bark per year, well packed in sacks furnished by the Defendant, to be delivered in Newark, New Jersey, at the price of twelve dollars and fifty cents per ton, payable by the Defendant whenever twenty tons were delivered; the term of five years to commence upon the first day of September, 1854.

The contract was signed by the parties, and after the commencement of the term, and before June thereafter, the Plaintiff delivered to the Defendant thirty or forty tons of bark, which was paid for at the price specified in the contract. Upon the trial it appeared that, prior to the month of June, the Defendant repeatedly urged the Plaintiff to deliver portions of the bark, which the latter promised to do as rapidly as he found practicable, but the above quantity was all that was delivered.

---

*Contracts—Recission—Restoration.* 3 *Hun,* 484 (5 *T. & C.* 592); 6 *Hun,* 284; 12 *Hun,* 602; 21 *Hun,* 303; 47 *App. Div.* 379 (62 *N. Y. Supp.* 80); 58 *Barb.* 193.

In June the Defendant gave notice to the Plaintiff that he would not receive any more bark upon the contract, except what was already under way, claiming that the Plaintiff had broken the contract, by failing to deliver quantities of the bark as required by the Defendant in his own business, and also upon the ground that he had learned that Plaintiff had no means of fulfilling the contract.

Upon trial at Circuit the Defendant claimed that the true construction of the contract was that the Plaintiff was to deliver the bark at reasonable times, and in reasonable quantities during the year, as required in the Defendant's business; and for the purpose of showing that such was the construction, offered to prove that, at the time of entering into the contract, he was engaged in tanning leather at Newark; that he used ground bark, each year exceeding a thousand tons, in his business; that it was necessary to use the bark from time to time during the year; that these facts were known to the Plaintiff; that the Plaintiff promised to keep the Defendant supplied with bark, as required for his business, to the extent of a thousand tons during each year of the term.

This evidence was objected to by the Plaintiff as immaterial, and the objection was sustained, and the Defendant excepted.

The Defendant further offered to prove that, at the time of making the original contract, and also at the time the subsequent agreement modifying the same was made, the Plaintiff fraudulently and falsely represented to him that he was the owner of a large quantity of hemlock land, and that he had ample means of performing such contract, when in truth he was not the owner of any such land, but was insolvent, and that the Defendant was induced to enter into the contract with the Plaintiff by such fradulent representations, and that he did not discover or learn of the fraud until a short time before his refusal to accept any more bark under the contract, for the purpose of showing a right to rescind the contract, and that he did rescind the contract upon this ground.

The evidence was objected to by the Plaintiff as immaterial, and rejected, and the Defendant's counsel excepted.

The Court charged the jury that the Plaintiff had the right to deliver the quantity to be furnished yearly, on any day in the year, and that he had until the last day in the year for the delivery of the entire quantity; to which the Defendant excepted.

The jury found a verdict for the Plaintiff, upon which judgment was rendered, and after its affirmance by the General Term, the Defendant appealed to this Court.

*George G. Reynolds* for Respondent.
*George J. Emmett* for Appellant.

GROVER, J.—The Judge upon trial held that by the true construction of the contract the Plaintiff had the entire year to deliver the thousand tons of bark required to be delivered per year, during five years.

In this I think he was correct. The undertaking of the Plaintiff was to "deliver one thousand tons of ground bark per year, for the term of five years, to commence on the first day of September, next."

Had this undertaking been to pay a thousand dollars per year, for the term of five years, no one would have questioned the right of the promisor to the whole year in which to make the payment. The words "per year" are equivalent to the word "annually," and, to my mind, convey the same idea.

It is true that the word "per" may be understood as "during," but had the latter word been used, the meaning would have been the same.

The promise would have been performed by a delivery at any time before the expiration of the year. The clause providing that the price should be payable whenever twenty tons were delivered does not change or affect this construction.

Its only effect is to show that the Plaintiff was not bound to deliver the entire quantity at one time, nor to wait for his pay until the whole quantity was delivered, but to give him the

right to deliver, from time to time during the year, and insist upon payment as often as he delivered twenty tons. It did not purport to give any right to the Defendant to insist upon the delivery of any portion in a manner different from the undertaking made by the Plaintiff.

Clauses are frequently found in contracts binding the creditor to receive partial payments from the debtor, before the time specified for payment of the debt, but it never has been claimed that such clauses conferred any right upon the creditor to insist upon such payments being made.

It is clear that the evidence of a promise by the Plaintiff to deliver the bark from time to time during the year, as required by the Defendant in his business, made before the contract was reduced to writing and executed by the parties, was properly excluded.

This comes within the familiar rule that all previous verbal negotiations and understandings are merged in the writing, which is the only competent evidence of the contract between the parties.

When the meaning of the language used is uncertain, or the construction is doubtful, the former may be ascertained, or the latter determined, by proof of the extrinsic facts known to the parties in reference to which the contract was entered into—in other words, those whose duty it is to determine the rights and obligations of the parties to the contract, may be informed of all such extrinsic facts within the knowledge of the parties to the contract, at the time of making it, as will afford any aid in determining the sense in which its language was used by the parties, and the intention and purposes designed to be effected by such use.

But when no such doubt or uncertainty exists, there is no occasion to resort to such evidence. It then becomes immaterial. That is the present case. There is no doubt about the meaning of a promise to deliver a thousand tons of ground bark per year, for a term of five years, or its construction.

Evidence, therefore, of the business of the Plaintiff; of the

quantity of bark used therein, or the times in the year when required for such use; of the amount of storage required therefor, etc. was immaterial.

The danger of injury, if exposed to rain or storms, was immaterial, and properly excluded on that ground.

The remaining question in the case is, whether the Defendant, for the purpose of showing his right to rescind the contract, had the right to prove that he was induced to enter into it by the false and fraudulent representations of the Plaintiff, that he had ample means to execute it; that he owned a large quantity of bark lands, and, as I understand the effect of the offer, that he had ample pecuniary means to enable him to perform the contract, and ample responsibility to respond in damages for any breach, when in fact he owned no such lands, and was utterly insolvent.

It is a settled principle that a party induced to enter into a contract by the fraudulent representations of the other, upon any matter material to the benefits and advantages expected to be derived from the contract, has, upon discovery of the fraud, the right, if exercised promptly, of rescinding the contract, and thus of putting an end to his liability thereon.

The question whether the Plaintiff owned the land from which the bark was to be procured was not material, for it would be all the same to the Defendant had the Plaintiff obtained the bark, whether from his own land, or by purchase from others.

The pecuniary ability of the Plaintiff to respond for a breach on his part is of a different character. An executory contract for the purchase and delivery of property, extending over a period of years, is obviously of more value if made with a solvent than with an insolvent party.

In the former case, if the article rises in the market to an amount exceeding the contract price, the purchaser will receive either the property or damages compensating the loss sustained by the failure, while in the latter case he would have no certainty of either.

Fraudulent representations as to the solvency of the Plaintiff were made upon a point material to the benefits derivable from the contract, and, I think, would authorize the party to rescind the same, by acting promptly upon discovery.

It is not necessary to determine this question, for the reason that a party exercising this right must not only act promptly, but must restore to the other party what he has received under the contract.

The Defendant had received thirty or forty tons of bark, and paid for it. This he did not offer to restore, upon receiving back the price paid for it.

It is no answer to say that he could not, because the bark had been consumed. If this was so, the right of rescission no longer existed, for this is a right that can only be exercised by restoring all that has been received, and when the power to do this ceases the right is at an end.

The judgment appealed from must be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

# HENRY R. HOSFORD, RESPONDENT, v. BENJAMIN BALLARD, APPELLANT.

*Ejectment—Lease—Breach—Forfeiture.*

In an action of ejectment brought to recover the possession of lands held by the Defendant under a grant in fee reserving rent, proof of a conveyance forty years before the commencement of the suit, to one from whom the Plaintiff derives title, proof of her grant reserving rent, and proof of the payment of rent to her heir-at-law, and subsequent grantees by the successive tenants, including the Defendant, sufficiently establish the title of the original grantee as against the tenants in possession.

Where a grant in fee reserving rent contains the express condition that if the rent shall be unpaid at the time appointed for the payment thereof, then the grant and the estate demised are to be void, determine and cease, and thereupon it shall be lawful for the grantor, his heirs and assigns, to re-enter, &c., it is not necessary for the Plaintiff in the ejectment brought for a breach of such condition to prove a demand of the rent.

The common law rule requiring such demand, on the premises, on the day, and for the precise amount, is abrogated by the statute which makes the commencement of the action of ejectment stand in place of such demand; and this statute applies as well to a grant in fee reserving rent as to a lease for years or other term less than a fee.

The statute of 1846, requiring fifteen days' notice of an intention to re-enter, does not apply to a grant in which the right to re-enter arises on default of payment by the tenant, but only where such right depends on the sufficiency of goods whereon to distrain.

APPEAL from a judgment of the Supreme Court in the Third District, affirming the judgment rendered for the Plaintiff at Special Term, on a verdict rendered in pursuance of an express instruction by the Judge to the jury, directing them to find for the Plaintiff.

The action is brought to recover the possession of certain land in the town of Halcott, in the county of Greene, being lot No. 16, in lot No. 36, in lot No. 20, in the Hardenburgh patent, claimed in fee by the Plaintiff, by reason of the breach

*Lease—Breach—Re-entry.* 41 *N. Y.* 222, 450; 118 *N. Y.* 483 (30 *St. Rep.* 27); 43 *Hun,* 372 (6 *St. Rep.* 400); 51 *Barb.* 643.

*Grant—Reserve of rent—Landlord and tenant.* 3 *Lans.* 62.

of the condition of a grant or lease thereof in fee by George Stephenson and Jane his wife, bearing date July 10th, 1822, to Tenent Peck, under whom the Defendant held, in which there was reserved to Stephenson and his wife, during their joint lives, and then to the said Jane and her heirs and assigns, on the first day of May, annually, thereafter, the yearly rent of $13.50, "provided, always, and these presents are on these conditions, that if the said yearly rent, or any part of it, shall be unpaid at the time above appointed for the payment thereof, or if the said party of the second part does not take possession and improve," etc., or if he leave the possession for six months, etc., or if he cut any wood, or timber, etc., and shall not observe the other agreements therein, etc., "then, and in any or either of these cases, these presents, and the estate hereby demised, are to be void, determine and cease, and thereupon it shall be lawful for the parties aforesaid of the first part, their heirs and assigns, into and upon the said premises to re-enter, and the same to have again, retain, repossess, and enjoy as in their first and former estate."

A deed of the premises by a Master in Chancery, dated in 1822, to Jane Sterling, was put in evidence; proof was given of her marriage to George Stephenson; of her death in 1829; of a conveyance of the premises by Elizabeth, her only child, to Henry Hosford, and by him to his daughter Jane Peck, and by her to the Plaintiff, her brother; also, proof of the occupation of the premises by the Defendant Ballard, the payment of rents, from 1829 onward, to Elizabeth, heir-at-law of Mrs. Sterling, to Henry Hosford, her grantee, and to his grantee, Jane Peck, and down to and including May 1st, 1859; that the rent due May 1st, 1860, was not, and has not been paid; and that this action was commenced in August, 1860.

The Court directed a verdict for the Plaintiff, upon which judgment was entered, and affirmed in General Term.

The Defendant appealed to this Court

*A. Bingham* for the Appellant.

*S. Hand* and *John H. Reynolds* for the Respondent.

WOODRUFF, J.—I find but two questions in this case which were not raised and decided in Van Rensselaer *v.* Barringer, heard at the same term and now decided.

First. Was the title of Jane Sterling, prior to her conveyance to Tenent Peck, sufficiently shown?

Second. Was the Plaintiff entitled to recover without proof of a demand of the rent which became due on the 1st of May, -860?

On the first question it must suffice to say, that proof of a conveyance to Jane Sterling forty years before the commencement of the action, and proof of the payment of the rent, reserved in her grant, to her heir-at-law and her grantees, from 1829 to 1859 (thirty years), by the tenants of the premises, was evidence enough of her title as against the Defendant, by whom the said rents were paid for many years.

Without pausing to inquire whether, as against the Defendant, these facts were conclusive, they certainly were primâ facie evidence, and being uncontradicted, they subject the Defendant to all the legal consequences resulting from the grant by Jane Sterling, and the breach of the condition thereof, by the non-payment of the rent due May 1st, 1860.

Second. Was the Plaintiff entitled to recover without proving a demand of the rent?

The condition in the grant in question is absolute and unqualified, that if the said yearly rent shall be unpaid at the time appointed for the payment thereof, "these presents, and the estate hereby demised, are to be void, determine and cease, and thereupon it shall be lawful for the parties aforesaid of the first part, their heirs and assigns, into and upon the said premises to re-enter," etc.

This is a perfectly legal and valid condition, not inconsistent with the grant itself, nor with any rule of law (Van Rensselaer *v.* Ball, 19 N. Y. 100), and other cases cited in Van Rensselaer *v.* Barringer, at this term).

By the terms of the condition, then, the inquiry whether there was or was not a sufficient distress upon the premises, is wholly immaterial to the Plaintiff's right.

The breach of the condition consists solely in the non-payment of rent, and by the non-payment of the rent the condition is completely broken. However many goods were upon the premises, the condition was broken; and if there were none, such condition was no more broken.

In the pursuit of his remedy, the Plaintiff might be affected by the inquiry whether there was a sufficient distress. But that the condition upon which, by an express and valid agreement, the right of re-entry would accrue, was broken by the mere neglect to pay the rent, is clear.

For such a breach can the Plaintiff maintain ejectment and recover possession?

It is objected that he cannot without a previous demand, made in strict conformity with the common law rule, on the day, on the premises, and for the precise sum due.

For the purposes of this case, let it be conceded that such is the rule of the common law, and that even the express words of the condition here leave the common law rule to operate; what is the result?

Although the right to disdrain for the rent is not given, in terms, by the instrument, the right nevertheless existed.

There might, but for our statute abolishing distress for rent, be a distress for rent reserved on a conveyance in fee reserving rent. From the time of the statute of 4th George II., chapter 28, (A.D. 1731), this was true both of a rent-seck and a rent-charge.

And our Revised Statutes (Part II., chap. 1, tit. 4, § 18) provided unqualifiedly for all cases, viz.: "When any certain services or certain rent reserved out of any lands or tenements shall not be paid or rendered when due, the person entitled thereto may distrain for the same."

The grantor and his heirs had therefore an alternative.

They could proceed, as at the common law, by a strict demand of the rent, and re-entry for condition broken; or they might distrain for rent in arrear.

To this condition of their rights the statute, 4th Geo. II., ch. 28, § 2, in substance re-enacted in this State (1 K. & R. 134,

§23, and 1 Rev. Laws of 1813, 440; and again, 2 Rev. Statutes, Pt. III., ch. 8, tit. 9, art. 2, § 30, p. 505), for the express purpose of saving the necessity of a previous demand and formal re-entry, added this further provision—that if no sufficient distress could be found on the premises to satisfy the rent, the landlord, if he has by law a subsisting right of re-entry for the non-payment of rent, may bring ejectment, and the service of the declaration in ejectment shall be deemed and stand instead of a demand of the rent in arrear, and of a re-entry on the demised premises.

If this statute is applicable to the Plaintiff, there is an end of the discussion. He has the right of re-entry, and as fully settled in Van Rensselaer *v.* Snyder, in this Court (13 N. Y. 299), the abrogation of the right of distress in 1846 made it unqualifiedly and inevitably true that in May, 1860, no sufficient distress could be found on the premises to satisfy the rent.

And it will follow that this action was properly brought; that it stands in place of demand of re-entry, and was properly sustained.

It is argued that this statute was not applicable to the Plaintiff; that he is not a landlord, and the Defendant was not a tenant; that the statute does not apply to grants in fee reserving rent.

This is an erroneous restriction of the meaning of the terms "landlord" and "tenant." One who holds land by any kind of title, whether for years, for life, or in fee, is tenant, and he of whom land is held subject to the rendering or payment of rent or service, is landlord.

The cases which hold that, since the act of 1787 concerning tenures, no feudal tenure can be created in this State, do not require that a statute so highly remedial should be restricted in its application to leases for a term or for life, when every evil it was intended to remedy called for its application wherever rent was reserved and the right of distress and of re-entry existed.

In Van Rensselaer *v.* Ball (19 N. Y. 107), Denio, J., on this

point, says: "The inconvenience which the statutes making a declaration in ejectment stand in the place of a strict demand were intended to remedy, was a great particularity and nicety attending this demand at common law; and this was precisely as applicable to rents arising upon grants in fee as upon leases for life or years I do not, therefore, see any reason, in the nature of the case, or in the language of the statutes, for confining this remedy by ejectment to cases of rent-service; and I am of the opinion that it is applicable to all cases of non-payment of rent where there was a right to re-enter at common law. This conclusion is confirmed by the consideration that actions of ejectment for non-payment of rents of this kind, have been frequently under discussion in the Courts of this State, and that it has been uniformly assumed that a strict demand was unnecessary, if the Plaintiff could show that there was no sufficient distress (Jackson *v* Collins, 11 Johns. 1; Van Rensselaer *v.* Jewett, 5 Denio, 121; The same *v.* Hayes 5 id. 477; The same *v.* Jewett, 2 Const. 141; The same *v.* Snyder, 3 Kern. 299)." See also opinion of Selden, J., in Van Rensselaer *v.* Slingerland (26 N. Y., at p. 587).

The statute of 1846, which provided that fifteen days' previous notice in writing of an intention to re-enter be given in certain cases, is not in conflict with this view.

That statute is, in terms, applicable to a case in which the right of re-entry is, by the grant or lease itself, made to depend upon the default of a sufficiency of goods whereon to distrain, and not where the right of re-entry is given by the lease or grant in default of payment of the rent when it becomes due.

Thus, when the *right of re-entry* is *reserved* and *given* to a grantor or lessor in any grant or lease, in *default* of a *sufficiency of goods and chattels* whereon to distrain for the satisfaction of any rent due, such re-entry may be made at any time after default in the payment of such rent, provided fifteen days' notice be given, etc.

Obviously, this does not describe the cases in which the right of re-entry is reserved and given on default of payment, with-

out any regard to the question whether there are goods and chattels on the premises or not (Keeler v. Davis, 5 Duer, 507).

Distress for rent being abrogated, the fifteen days' notice was substituted for a distress, or a deficiency of goods whereon to distrain, in all cases in which, according to the agreement, a distress was the remedy prescribed for the collection of the unpaid rent.

The judgment should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

---

## THE HATTERS' BANK, RESPONDENT, v. JOHN D. PHILLIPS AND OTHERS, APPELLANTS.

*Promissory Note—Consideration—Surrender of Old Note.*

The existence of a prior note, and the fact that the note in suit was given for the renewal of such prior note, is sufficient evidence of a consideration for the latter note, and it is to be presumed that the prior note was given up, in the absence of evidence to the contrary.

The giving of such note as a renewal, is a payment of the former note, and an extinguishment of all liability for the same.

THIS is an appeal from a judgment of the General Term. The action was upon a promissory note of $1,000. The referee found, as matters of fact, that the note was made by the Defendants to the order of Benedict & Farnam, and by them indorsed and delivered, before maturity, to the Plaintiff, for value, and reported in favor of the Plaintiff for the note and interest.

By the answer the defense was:—

1. That the note in suit was without consideration, inasmuch as it was given to the payees, Benedict & Farnam, to enable them to take up a previous note given by the Defendants to the same payees, and by the latter indorsed by the Plaintiffs; which previous note was without consideration, and to secure the payment of which the Plaintiffs had collaterals out of which they had realized sufficient to pay the note in suit.

2. That Plaintiff is not the owner and holder of the note in suit, but transferred it to one Clark, after maturity; and if the later ever re-transferred it to the Plaintiff, he did so without consideration.

Judgment was entered upon the report, and the Defendants appealed to the General Term, where the judgment was affirmed. The facts and points made, so far as material, appear in the opinion.

*Wm. E. Curtis* for Appellants.
*Samuel Hand* for Respondent.

MILLER, J.—The Defendants claim that the promissory note to recover which this action was instituted, was made for the accommodation of Benedict & Farnam, the payees thereof; that the Plaintiff did not part with the value for the note; that it was given to secure a prior note, which was past due, and that there is no evidence to establish that the Plaintiff surrendered or canceled the former note, or received the one in suit, otherwise than as security for a precedent debt.

Upon the trial of this cause before the referee, it appeared that the note in question was given in renewal of an original note of $1,500, discounted by the Plaintiff on the 8th of August, 1858, and which had been renewed, from time to time, until the note in suit was given for the balance remaining unpaid.

There was evidence, on the part of the Defendants, to prove that the note was given to the payees for their accommodation, and at their request; and also evidence to show that the payees paid the discount, and that the check was sent to the Defendants for the amount of the note originally given, and direct proof by the cashier, or the bank, that the Plaintiff never had any collaterals whatever for this note, or for any of the renewals.

The existence of the former note would seem to be a sufficient consideration for the making of a new one, and a payment of the old note. It is to be presumed, therefore, that the

old note was surrendered and given up, even although it is not distinctly made to appear that such was the fact, by direct testimony.

In every sense it was a payment and cancellation of the old note, and no action could be maintained to recover it under the facts proved. It extinguished that indebtedness, and was, therefore, a parting with value by the bank. Aside, however, from this view of the matter, it was, at least, a question of fact whether the Defendants had not really received the avails of the note first discounted, of which the note in suit was a renewal.

The referee's report is adverse to the Defendants upon this point, and they are thereby concluded from raising the question discussed, even if it was sufficiently presented to his consideration upon the trial, of which I entertain considerable doubt.

It is further insisted that an action having been brought upon the note in the name of George W. Clark, as the owner, and it appearing that it was accommodation paper, and received by him after it was due, and he having failed to restrain this action, it cannot be maintained by the Plaintiffs. The proof upon the trial established that the Plaintiffs sent the note, after maturity, to their attorneys for collection; and the attorneys, to save the trouble of proving the corporate existence of the Plaintiff, and giving security for costs, obtained permission to use Clark's name, and did so; that upon the trial the Plaintiff was permitted to discontinue, it appearing that Clark was not the real party in interest; that there was no actual delivery to Clark, and after the suit Clark abandoned all claim to the note. The suit was commenced in the name of Clark, without an actual transfer of the note, and the title did not actually pass. It was not like a case where a note or chose in action is passed over to a third party, in consideration that he should collect it, and apply it upon an account then existing between the parties; for no title whatever was passed, and for want of such title the action could not be maintained. The title to the note remained in the bank; and the Defendants, under the circumstances, should not be permitted to avail themselves of an attempted

transfer, which was invalid, and which never was consummated.

As heretofore stated, it is denied that the Plaintiff held any collateral security, and hence there is no force in the point taken, that the bank surrendered any such securities.

The testimony of conversations with Mr. Baird, as to the circumstances under which the note was received, and the instructions given, was a part of the res gestæ.

It showed the possession of the Plaintiffs' attorneys, for the purpose of collection. The distinct objection was not taken that the evidence failed to show that Mr. Baird acted as a director, and, on the direct examination, when objection was made to the testimony, the proof showed that he was a director.

If this was contradicted by the cross-examination, so as to make it dubious whether he was such a director, the Defendants should have asked the referee to strike out the testimony, which was not done. It may also be remarked, that if the distinct objection had been made, it might have been obviated by other testimony.

There was no error in admitting the question, "Was the note ever transferred to Mr. Clark, so as to give him title?" It was not objected to as calling for the opinion of the witness, but merely as incompetent.

It was clearly competent to prove that there was no such transfer, and a part of the res gestæ, and if objectionable, as leading or asking for an opinion, the objection should have been stated. But even if improperly admitted, the answer given could not possibly affect the result, as all the circumstances attending the transaction were fully proved.

The other objections to the evidence are of a similar character, and do not require any extended comment.

MASON, J.—This is an action upon a promissory note of one thousand dollars, made by the Defendants, and payable to the order of Benedict & Farnam, at the Hatters' Bank, Bethel,

Connecticut, three months after date, and is dated "December 21st, 1859."

The cause was tried before a referee, who found the following facts, to wit: That the Defendants, as copartners in business, made the promissory note mentioned and set forth in the complaint in this action. That the payees of the said note, before the maturity thereof,: endorsed the said note to the Plaintiffs for a valuable consideration. That the Defendants have not paid the said note, or any part thereof, and that the Plaintiffs are now the lawful owners and holders of the said note, and also that the Plaintiffs are, and were at the time stated in the complaint, a corporation, duly chartered under and by the laws of Connecticut; and upon these facts he gave judgment for the Plaintiff for the amount of the note, and interest, at $1,069 38-100.

The Defendants excepted to the findings of fact, that the payees of the note in the complaint mentioned endorsed the same to the Plaintiff, before the maturity thereof, for a valuable consideration, and that the Plaintiffs are the lawful owners and holders thereof, and also to the referee's conclusion of law, that the Plaintiffs were entitled to recover, &c.

As there was evidence in the case upon which to predicate these findings of facts by the referee, they are conclusive upon this Court, and cannot be reviewed upon this appeal.

The Plaintiff was entitled to recover upon the facts found, and the judgment must be affirmed, unless the referee erred in some of his findings in admitting evidence.

The Defendants set up the defence, in their answer, that this note was transferred by the Plaintiffs to one Geo. W. Clark, for and on behalf of Benedict & Farnam, and upon the trial gave evidence tending to show that the said Clark brought a suit upon the note, and upon information and belief denied that the Plaintiffs are the owners and holders of the note. It therefore, in reply, became material for the Plaintiffs to show that the note was never, in fact, transferred to Clark, and for this purpose George C. Barrett was called, who testified that this

note was transmitted to him, by the Plaintiffs, for collection, and that as the Plaintiffs were a foreign corporation, and he might be put to some trouble in proving the corporation, and giving security for costs, he sued the note in the name of Clark, and with his consent, and when the Defendants set up in their answer, that the said Clark was not the holder and owner of the note, and found that he was going to be beaten in the suit, he discontinued the same.

There was no error committed in allowing Mr. Barrett to testify that he received the note from the Plaintiffs, shortly after maturity, with instructions to take proceedings for the collection of the same.

The instructions were a part of the res gestæ.

Barrett testified that Clark paid nothing for the note, without any objection; and no error was committed in allowing him to testify that he was not to pay anything.

I wil not go over the various objections raised by the Defendants, while the witness was giving his evidence, and the various questions which were put to him. None of them are well taken.

The Plaintiff's case was as well proved without much of the evidence as with it, and the Defendants were not prejudiced by the admission of this evidence.

The judgment should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

## JOHN P. SANDERSON *v.* THOS. C. MORGAN AND OTHERS.

*Pleading—Demurrer—Alien Enemy—Rebellion.*

The same reasons making it improper for an alien enemy to be capable of maintaining actions in our Courts, apply to any other kind of enemy adhering to an organized force which is prosecuting a war against the Government.

A citizen of the United States adhering to the forces of the rebels in their war upon the United States, is under the disabilities of an alien enemy.

CLERKE, J.—Although the Plaintiff was not an alien enemy at the time this demurrer was put in, he was an enemy adhering to an organized force at war with the Government of the United States, which had been recognized as belligerents, both by the civil Courts and the executive branch of the Government.

The same reasons which make it proper that an alien enemy should be incapacitated from making contracts, or from maintaining actions, apply with equal force to any other kind of enemy adhering to an organized force which is prosecuting war against the Government.

In the one case as well as the other, if the enemy had the legal capacity to do these things, it would lead to consequences which may have the effect of contradicting the operations of the war, of throwing obstacles in the way of the public efforts, and of causing disorder, imbecility, and augmentation of treason.

The fact that the enemy is also guilty of treason, in no way lessens the weight of these objections, but, on the contrary, increases them, by adding to his position of enemy the moral guilt of rebellion, and the possible evil effect of his example.

Open, organized rebellion is war, and has to be opposed and

*Alien enemy—What constitutes—Prosecution of claims.* 4 *Lans.* 181.

encountered like any other war, with the same precautions, operations, and avoidance of obstacles.

In Mrs. Alexander's case (2 Wallace, 404) it was held, that all the people of any district that was in insurrection against the United States in the late rebellion, were to be regarded as enemies, except in so far as by action of the United States Government itself that relation may have been changed; consequently seventy-two bales of cotton belonging to Mrs. Alexander, seized by the Federal force under General Banks, on its expedition to the Red River, was considered a proper subject of capture; and it was asserted by the Chief-Justice, in delivering the opinion of the Court, that they must be governed by the principle of public law so often announced from that bench as applicable alike to civil and international wars; that all the people of each State or district in insurrection against the United States must be regarded as enemies until, by the action of the Legislature and the executive, or otherwise, that relation is thoroughly and permanently changed.

Thus it is established by the highest authority, that an individual remaining voluntarily in territory of the Confederate States after the civil war has commenced, is subject to all the liabilities of an alien enemy; and, it is scarcely necessary to add subject also to all the disabilities of an alien enemy.

The principles of the law of nations, as announced by Vattel and other writers on public law ,justify these conclusions. When a revolt rises from the form of an insurrection or rebellion into the proportions of a civil war, and when a nation becomes divided into two parties, absolutely independent, and no longer acknowledging a common superior, the State is dissolved, and the character of the war between the two parties, in every respect, is the same with that of a public war between two different nations. The obligation of observing the common laws of war is, therefore absolute—indispensable to both parties—and the same which the law of nature obliges all nations to observe in the prosecution of war against each other. (See Vattel's Law of Nations, Book III., chapter 18.)

It cannot, then, be doubted, that a person adhering to the Confederate States in the late civil war, is as incapable of prosecuting an action in this State as if he was an alien enemy.

It has been, however, always held, that this incapacity only applies to persons actually present in their own country at the time of the war.

This is not specifically alleged of the Plaintiff in the supplemental answer; but the general allegation that the Plaintiff is a resident of the State of Florida, and has been for several years, is probably sufficient to bring him within the rule.

The judgment or order should be affirmed, with costs.

Affirmed.

JOEL TIFFANY,
State Reporter.

## SETH B. GROSVENOR, RESPONDENT, *v.* THE NEW YORK CENTRAL RAILROAD COMPANY, APPELLANT.

*Common Carrier—Delivery of Freight—Bailment—Negligence of Bailee.*

To establish the liability of a common carrier, it must be proved that the property was actually delivered to and accepted by the carrier, or some person authorized by him to receive the same. It is not enough that the property is delivered upon the premises, unless the delivery is accompanied by notice to the carrier, or his agent.

THE complaint in this action alleges, that in April, 1861, the Plaintiff delivered to the Defendant, at Clifton Springs, a cutter, to be carried by it to Buffalo, and paid the Defendant therefor, which the Defendant agreed to do, and that, by the negligence of the Defendant, it became wholly lost to the Plaintiff.

The answer denies these allegations.

The issue was tried in the Superior Court of Buffalo, before Justice Clinton and a jury, when the following facts were proved:—

That the Plaintiff called upon the Defendant's depot agent at Clifton, and paid him the freight on the cutter, and the fare of his servant to Buffalo, and told him that he would send them down in the morning, to go by the afternoon train.

The servant brought the cutter, by Plaintiff's directions, to have it shipped to Buffalo, and arrived at the depot about six o'clock in the morning, and placed it on the platform of the freight-house, next to the railroad track, with one end next

---

*Carriers—Commencement of liability—Delivery.* 48 *N. Y.* 504; 144 *N. Y.* 207 (63 *St. Rep.* 75); 9 *Hun,* 172; 57 *Barb.* 517; 38 *How. Pr.* 295; 40 *How. Pr.* 472; 8 *Abb. N. S.* 415; 2 *Lans.* 271, 329; 2 *Sweeny,* 266; 2 *Daly,* 494; 11 *Misc.* 431 (65 *St. Rep.* 219; 32 *N. Y. Supp.* 125); 38 *Misc.* 803 (78 *N. Y. Supp.* 886).

*Carriers—Estoppel to deny agency.* 21 *Misc.* 290 (47 *N. Y. Supp.* 201; 4 *Ann. Cas.* 362).

the freight-house, and the other towards the track, and went back after the thills; that he returned in about an hour with them, and stopped in front of the passenger depot, about six rods from the freight-house, and saw the Defendant's baggage-man, one Hall, who, at the time, was sweeping out the depot, anad said to him: "There is some stuff to go to Buffalo." He asked on what train; to which he replied, "The one o'clock" and then took the thills and laid them with the cutter. He had not then seen the baggage-man do anything with the freight, and did not ask for or take any receipt for the property. That Sutherland was the Defendant's agent there, and had been such agent for three years, and was alone authorized to receive and deliver freight, and resided in the depot. That Hall was baggage-man, and had never received freight, or given receipts therefor, except by his special directions, and had no general orders on that subject. *That freight is always received and delivered at the east end of the freight-house.* The track run east and west. There is a platform alongside of the freight-house, next the track, and comes within a few inches of a freight car on the track, which is used for receiving and delivering freight from and to the cars, when it is taken into or from the freight-house and weighed; and that *it is received from and delivered at the east end of the depot.* That the cutter, when on the platform, where it was left by Plaintiff's servant, could not be seen from the passenger depot. That the cutter, placed on the platform, as stated, *would project over it nine inches.* That two or three hours afterwards a car in *a passing train caught the cutter and broke it, and the first knowledge the agent had of its being there was seeing it pass his office at the passenger depot on this car, broken.* That it was the invariable custom of the shipper to mark property and its destination before the Defendant received it, when he weighed it and ascertained the freight. And that the Plaintiff's servant did mark a box, which he brought with the cutter in the afternoon, before shipment, and said he wanted it to go to Buffalo.

At the close of the Plaintiff's testimony, and at the close of the evidence, the Defendant made a motion for a nonsuit, upon this ground—that upon the undisputed facts the Plaintiff was not entitled to recover; which motion was denied by the Court, and an exception taken to the decision by the Defendant.

The jury found a verdict for the Plaintiff for $78.16, for which, judgment, with costs, was entered.

The Defendant appealed to the General Term of that Court, where the judgment was affirmed.

The Defendant thereupon appealed to this Court.

*A. P. Laning* for Appellant.
*J. H. Reynolds* for Respondent.

MILLER, J.—I am of the opinion that the Court erred in refusing to nonsuit the Plaintiff upon the trial.

To render a party liable as a common carrier, it must be established that the property was actually delivered to the common carrier, or to some person duly authorized to act on his behalf.

The responsibility of the carrier does not commence until the delivery is complete (Angell on Carriers, § 129; Story on Bailments, § 532).

It is not enough that the property is delivered upon the premises, unless the delivery is accompanied by notice to the proper person. (Packard *v.* Getman, 6 Cow. 757; Tower *v.* U. & S. R. R. Co., 7 Hill, 47; Blanchard *v.* Isaacs, 3 Barb. 388; 2 Kent's Com. 604; 2 Parsons on Con. 654). The liability of the carrier attaches only from the time of the acceptance of the goods by him (Story on Bailments, § 533; 6 Cow. supra). To complete the delivery of the property within the rules laid down in the authorities, I think it is also essential that the property should be placed in such a position that it may be taken care of by the agent or person having charge of the business, and under his immediate control. It must be accepted and received by the agent.

It appears in the case at bar, that the cutter of the Plaintiff was placed upon the platform of the Defendant's freight-house by a servant of the Plaintiff (the freight having been previously paid), to be transported to Buffalo.

At the time when it was thus left, a baggage-man in the Defendant's employment, who was then engaged in sweeping out the depot, was notified that there was some freight to go to Buffalo in the noon train. The servant of the Plaintiff testifies that he had seen this person receive and put freight on the cars, and at this time he apparently had charge of the depot, although the proof on the part of the Defendant shows that another employé was the real freight-agent, and the person with whom the contract was made for the carriage of the property, and that the baggage-man had no authority to receive it.

Up on this state of facts, I am inclined to think that the Plaintiff had established sufficient, primâ facie, to submit to the jury the question whether the baggage-man was authorized to receive the property, and whether the notice to him was of itself sufficient.

Persons dealing with railroad corporations and parties engaged in the transportation of freight, have a right to consider that those usually employed in the business of receiving and forwarding it have ample authority to deal with them.

It is enough to establish a delivery, in the first instance, to prove that a person thus acting received and accepted the property for the purpose of transportation; and even although it subsequently appears that another employé was actually the agent having charge of this department of business, yet the company who sanction the performance of this duty by other persons in their employment, and thus hold out to the world that they are authorized agents, are not at liberty to relieve themselves from responsibility by repudiating their acts. So far, then, as this branch of the case is concerned, it was, at least, a question of fact, to be submitted to the jury, under proper instructions, whether the baggage-man of the Defend-

ant, to whom, it is claimed by the Plaintiff, the cutter was delivered, was the agent of the Defendant duly authorized to receive the same, and whether notice of its delivery was given to him as such agent.

But whether he was such agent, or the duty of receiving freight devolved upon another person, the Defendant could not be held liable, under any circumstances, without an actual and complete delivery of the property into the possession of the corporation, and under its control. This, I think, was not done.

The undisputed testimony shows that the cutter was placed upon the platform, and that, within two or three hours afterwards, it was carried away and broken to pieces by a passing train of cars. The fact that it was thus carried away evinces that it was carelessly exposed by the Plaintiff's servant; that the destruction of the cutter was occasioned by his negligence, and that the delivery was not as perfect and complete as it should have been.

The accident would not have happened had the cutter been placed beyond the reach of passing trains.

It was not enough that the agent was notified, to make out a valid acceptance and delivery.

The place of delivery was important, and it was equally essential that due care should be exercised.

Suppose the servant had left the cutter on the track of the railroad, and notified the agents, would the Defendant have been responsible? Clearly not, for the apparent reason that there was no delivery upon the premises—no surrender of the property into the possession of the agent.

Until it was actually delivered, the agent was actually under no obligation to take charge of the property, even if notified.

It is apparent that the Plaintiff was in fault in not delivering the property to the Defendant, and in leaving it in an exposed condition, which caused its destruction; and having failed to establish this material part of his case, he should have been nonsuited.

As a new trial must be granted, for the error stated, it is not important to examine the other questions raised and discussed.

Judgment reversed, and new trial granted, with costs to abide the event.

All reverse.

JOEL TIFFANY,
State Reporter.

---

## STEPHEN LEROY AND OTHERS v. THE PARK FIRE INSURANCE COMPANY.

*Insurance—Policy—Condition—Survey.*

A paper purporting to be a survey of premises for the purpose of insurance, which was made out as a private memorandum of the insurance agent, after the delivery of the policy to the insured, is inoperative as affecting the policy of insurance.

THE Plaintiffs were owners of a paper manufactory, situte in Dutchess County, which they desired to have insured in the Defendants' Company. Jordan Phillips was the local agent of the Defendants, and issued the policy on which this suit is brought. The policy bears date of October 2, 1860, and was to continue for the period of one year.

About six months thereafter, to wit, in May, 1861, an interview took place between the Plaintiff Leroy and the agent Phillips, in which Phillips requested a survey to be made of the property, and which a survey, described as No. 280, was made out, as testified to by Phillips, May 22, 1861.

The date of this paper Phillips afterward altered to that of the 14th of October preceding.

Leroy testified that at the interview in May, Phillips told him he wanted an appraisal of the mill for his own private use, which was put down in writing. That he then wanted a survey made, which Leroy afterwards had made and sent

to him. He denies that it is the paper claimed to be survey No. 280, but says that Phillips called that paper a private memorandum, and that Leroy never read it.

This paper contained a statement, in answer to a question if there was a forcing-pump in the mill, in that end:

"No; fountain-head or flume above the top of the mill, where we attach a hose that will throw water over the whole building."

"Are there casks in each loft, constantly supplied with water?"

"No casks, but have water in every room, led through by iron pipes and faucets."

Evidence was given of the withdrawal of water from the flume and pipes.

At the close of the Plaintiff's testimony, the Defendants moved for a nonsuit, which was denied.

At the close of the trial, the Defendants made the requests to charge, which were set forth in the opinion of the Court.

The jury found for the Plaintiffs.

The General Term of the Second District affirmed the judgment, and the Defendants now appeal to this Court.

*John Thompson* for the Appellants.
*H. A. Nelson* for the Respondents.

HUNT, Ch.J.—Assuming the facts to be uncontradicted, that the survey was a valid and effective paper, and that the same was a warrantee, the Defendants asked the Court to charge that, as there was no water in the flumes or trunk at the time of the fire, and had not been for five months prior to that, so that none could be thrown over the building or on the wheels, the conditions of the survey and policy, in respect to that fact, were violated by the Plaintiffs, and that they could not recover.

If the Defendants had requested the law to be thus charged, that if the jury were of opinion that the survey had been delivered by the Plaintiffs as a valid instrument, and if they

should find the facts respecting the absence of water to be as claimed by the Defendants, a fair question would have been presented.

Two strong objections upon the facts, however, are found in the case, against the propriety of this request in its present form.

First. The Plaintiff Leroy, as well as the witness Howard, testify, in substance, that the paper signed on the occasion described by the insurance agent as signed by Leroy, was expressly declared by the agent to be needed and intended as his private memorandum merely. That it was never read by him to Leroy, and that it had been altered in its date, and that it was not the paper offered in evidence (see Rowley *v.* Empire Ins. Co., 36 N. Y. 550; Plumb *v.* Mutual Ins. Co., 18 N. Y. 392).

The Defendants were not justified, in the face of this evidence, in assuming that this was a valid survey, binding on the Plaintiffs, and in asking for a charge, as to the law, excluding the right of the jury to decide upon the disputed fact.

It is a serious question whether, under Rowley's case, just cited, this survey, in every respect, was not the act of the company rather than that of the Plaintiff.

Another objection arises from the time when this occurrence took place. The insurance contract was fully completed in October, 1860, and the policy then delivered, to take effect from its date.

The policy was sent to the Plaintiffs, and there was no agreement on their part that the delivery was to be conditional upon the procuring of the survey.

The agent did not then make any such claim, nor did he on the trial. He simply says, *that when he sent the policy* (without condition), he also sent a survey, to be filled out and returned. When the policy was sent, without question or condition, the contract was complete and obligatory. The rights of the parties were fixed by the papers as they then stood.

A subsequent survey, condition, or warrantee was entirely inoperative. It was as ineffectual as would be a statement of a borrower's salary, or the value of property mortgaged, made months after the contract was completed.

For these reasons the Defendants can take no benefit from the requirement under discussion.

The Defendants made four other requests to charge, of which numbers two, five, and six are based upon the same ideas.

They assume the existence and validity of the survey; that there has been a violation of the facts represented to exist, without allowing the jury to pass upon either branch of the case, and ask a legal conclusion in favor of the Defendants. For the reasons already given, this claim cannot be sustained.

The Judge submitted to the jury the question of the materiality of the risk of the absence of water from the flumes and the pipes, which, in any aspect except that of an absolute warrantee, was the proper question to be submitted, and was the question raised by the answer (Grant *v.* Howard Ins. Co., 5Hill, 10; Townsend *v.* North-Western Co., 18 N. Y. 168).

The Defendants requested the Judge to charge, that leaving the mill open and unprotected made the risk greater, and avoided the policy, and that the leaving of paper cuttings in the mill produced the same effect.

These objections have no weight. Paper cuttings would naturally and properly be found in a paper-mill. Whether carelessly or neglectfully used, or how far carelessness was to be charged in leaving the mill unwatched, and what was to be its effect, were questions for the jury.

The Defendants, if they wished attention called to these points, should have asked that the questions of fact be submitted to the jury, under proper instructions from the Court.

They did not do so.

Judgment should be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

# HENRY S. REDFIELD, ADMINISTRATOR, ETC., v. GEORGE TEGG.

*Commission Broker—Evidence—Inference.*

Where a broker has been employed to sell real estate, and has advertised the same, and a sale is effected in his presence, it may be presumed that he procured it to be made, even though he do not prove that fact by positive evidence.

CLERKE, J.—Was the referee right in denying the motion to dismiss the complaint?

The complaint alleges that the Defendant employed the firm, as real estate brokers, to sell his farm on the Lyell Road, containing about sixty-three acres, together with certain personal property, and that the Defendant agreed to pay them, for so doing, the customary commission.

It further alleges that, in the month of January, 1858, they did effect a sale of the farm and said personal property to Mary Louisa Ritter, for the sum of $13,600, and that the customary commissions for such services are one per cent.

The complaint demands judgment for $136. Gunnison, one of the firm, testifies that, some time previous to the sale, the Defendant gave him his real estate for sale, and that he entered it in his register-book, and advertised it on a card, put up in front of his office, in the Arcade. From May, 1857, when they were first employed, he testified that the Defendant was in several times, trying to find a purchaser; that he sent several people—no less than three or four—to the Defendant. The attention of people calling at the office was directed to this property. Defendant was there once a week for several weeks.

---

*Broker—Commission—When earned.* 49 *N. Y.* 564; 67 *Barb.* 259; 41 *How. Pr.* 144; 5 *T. & C.* 707; 2 *Sweeny*, 412.

*Broker—Double agency.* 15 *St. Rep.* 226; *City Ct. Supp.* 16; 7 *Lans.* 179.

Ritter, a friend of the lady who afterwards purchased the property, came to him and said they had been trying to trade, and could not; they wished him to examine the property, and to try to get them to agree.

He accordingly went to see the property once or twice. He went all over it; came home and calculated the value of the property of each. They came again and looked (the valuation, I suppose) over together, and after having several interviews in his office, talking the matter over, they wished him to draw a contract, on which they had pretty much agreed. The agreement, and an addition on the back of it, were subsequently signed and completed, one dated the "14th Jan.," and the other the "20th Jan., 1858." Some time before the sale the Defendant was informed by him that the commission would be one per cent.

Another member of the firm was sworn, but he added nothing material to the testimony of Gunnison.

On this evidence the Defendant's counsel moved for a nonsuit, on the ground that it did not appear that the Plaintiffs found the purchaser, and that they were not, therefore, the procuring cause of the sale; and second, that, as it appeared by exhibit "A" that they had received, or had become entitled to receive, their full compensation from Ritter, they could recover no compensation from the Defendant, even if it was necessary, after the proof of employment and several subsequent visits of the Defendant, with his conversations and inquiries, and of various efforts to sell the property, also to prove that they procured the purchaser.

I see nothing in the evidence to show that they did not procure him. They advertised the property, many people called at their office, inquiring about it; and it may be very correctly inferred that it was in consequence of this advertising, and other efforts of the Plaintiffs, that information relative to it reached Ritter, either directly, or from some other person who had information directly from the same source.

It is quite evident that Defendant retained Plaintiffs, and agreed to pay the commissions, by not dissenting when he was informed of what they would be. He afterwards called at their office several times, and finally came with the purchaser and requested them to effect an agreement, which the Plaintiffs succeeded in doing.

I think this in connection with the effort to sell from the beginning, may very justly be considered as services rendered in pursuance of the original employment.

Besides, in the contract with Ritter, marked as exhibit "A," there is a clause by which both parties acknowledge their indebtedness to the Plaintiffs to the amount of their customary commissions. Gunnison swears that the Defendant examined the contract after it was drawn. "He hesitated, and deliberated, and, at length, concluded to sign the contract."

This may be taken as an admission that the sale was effected through the agency of the Plaintiffs. But I do not think that it is an admission to operate against the Plaintiffs, that the Defendant shows that the purchaser was to pay the commission, and that it relieved the Defendant from his obligation to pay the Plaintiffs for their services.

The Plaintiffs rendered services, indeed, to both. They enabled Ritter to dispose of the houses in Rochester, and the Defendant to dispose of his farm on the Lyell Road. Ritter does not acknowledge himself liable for the disposal of the Defendant's farm; but, if the admission amounts to anything in relation to him, it makes him, or rather his principal, liable for services rendered to her in disposing of her houses.

After the motion for the dismissal of the complaint was denied, the Defendant proceeded with his defence, and, on the whole evidence, the referee finds, as conclusions of fact, the retainer by the Defendant, his promise to pay one per cent. upon the amount for which the property should be sold, and that, in pursuance of such retainer, the Plaintiffs registered and advertised the Defendant's property for sale, in their usual manner, and did afterwards effect the sale of said property.

The General Term has not interfered with the conclusions of facts; and the referee's conclusion of law, that the Plaintiffs are entitled to recover, necessarily follows.

I think the judgment should be affirmed, with costs.

Affirmed. JOEL TIFFANY,
State Reporter.

---

## JOHN HARDMAN AND DANIEL GUILFOYLE v. JOHN B. BOWEN.

*Assignment for benefit of Creditors—Acknowledgment—Construction of Statute of* 1860.

An assignment of real or personal property for the benefit of creditors must be in writing, and be acknowledged before delivery, in the presence of some officer authorized to take the acknowledgment of deeds, or it will be inoperative to vest the title in the assignee.

A statute prescribing the mode of making and executing conveyances of

---

*Assignment for creditors—Execution.* 45 *N. Y.* 55; 82 *N. Y.* 496; 11 *Hun,* 402; 35 *Hun,* 265; 39 *Hun,* 543; 86 *Hun,* 421 (68 *St. Rep.* 178; 33 *N. Y. Supp.* 521); 8 *App. Div.* 39 (40 *N. Y. Supp.* 400); 20 *Misc.* 627; 53 *How. Pr.* 466; 3 *Daly,* 31; 10 *Daly,* 151; 15 *Daly,* 426 (28 *St. Rep.* 414; 8 *N. Y. Supp.* 100).

*Assignment—Subsequent acts of assignor—Effect.* 85 *N. Y.* 468; 17 *Hun,* 587; 39 *Super. Ct.* 180; 31 *St. Rep.* 58 (9 *N. Y. Supp.* 621).

*Assignment—Resquisites of certificate.* 154 *N. Y.* 528; 20 *Misc.* 627 (47 *N. Y. Supp.* 7); 22 *Abb. N. C.* 102 (19 *St. Rep.* 64; *N. Y. Supp.* 243).

*Assignment for creditors—When operative.* 57 *N. Y.* 642; 77 *N. Y.* 357; 24 *Hun,* 124; 67 *How. Pr.* 352; 14 *Abb. N. C.* 450.

*Assignment for creditors—Statement of residence.* 55 *Hun,* 571 (29 *St. Rep.* 424; 9 *N. Y. Supp.* 243).

*Statutes—Abrogation of common law.* 46 *N. Y.* 129; 89 *App. Div.* 248 (86 *N. Y. Supp.* 52); 37 *How. Pr.* 159; 6 *Abb. N. S.* 401; 5 *Lans.* 16; 10 *N. Y. Supp.* 837.

property to make them operative, may be altogether affirmative in its requirements, and yet by implication be strongly negative.

THIS is an action of replevin. The Plaintiffs claim to make title to the property through an assignment in trust for the benefit of creditors, made by James Sheridan, John Sheridan, and Patrick Sheridan.

The Defendant is the Sheriff of Broome county, and claims to hold the property by virtue of a seizure thereof, upon an attachment issued out of the Supreme Court in favor of one Phelps, and other creditors, against the said Sheridans.

The cause was tried before Justice Balcom, without a jury, and he found the following facts, to wit:

That the said Sheridans made the said assignment on the 31st December, 1860, the said goods being in Binghamton, and that the Plaintiffs took possession of the goods on the day the assignment bears date. That they commenced making an inventory of the goods on the first day of January, 1861. That the assignment was not acknowledged by the assignors when it was delivered, but was proved by the subscribing witness thereto, on the third day of January, 1861, and was recorded that day in the office of the Clerk of Brome County. That the Defendant was the Sheriff of Broome county at the date of the assignment, and still is such Sheriff. That as such Sheriff he took possession of the said goods, on the second day of January, 1861, by virtue of an attachment issued out of the Supreme Court, bearing date that day, against the property of the said Sheridans, in favor of John J. Phelps and others, who recovered a judgment in the Supreme Court in the action wherein said attachment was issued, on the 14th day of February, 1861, for $880.79 damages, and costs. The goods were worth $1,200. The goods were replevied and delivered to the Plaintiffs.

The Judge gave judgment for the Defendant for a return of the property, finding the title in him, holding that the assignment had not become operative when the Defendant seized the goods on the attachment, because the assignment was neither acknowledged nor proved.

The Plaintiffs appealed from the said judgment to the General Term, where the judgment was affirmed, and the Defendant appealed therefrom to this Court.

*George Bartlett* for Appellants.
*Hotchkiss & Seymour* for Respondent.

MASON, J.—The question presented for adjudication in this case is, whether the delivery of this assignment, executed by the Sheridans, but not acknowledged, with the delivery of the possession of the property to the Plaintiffs, under the assignment, passed the title to them, so that they can hold it against the Defendant's levy on the attachment against the Sheridans, in favor of Phelps and others.

The question depends entirely upon the construction to be put upon the first section of the Act of April 13, 1860, which declares that "Every conveyance or assignment made by a debtor or debtors of his, her, or their estates, real or personal, or both, in trust, to an assignee or assignees, for the creditors of such debtor or debtors, shall be in writing, and shall be duly acknowledge before an officer authorized to take the acknowledgment of deeds, and the certificate of such acknowledgment shall be duly endorsed upon such conveyance or assignment before the delivery thereof to the assignee or assignees therein named" (Laws of 1860, chap. 348).

The argument of the Appellant's counsel is, that this statute is merely directory, and leaves the former common law in full force; and this argument is sought to be maintained upon some quite elementary principles in the construction of statutes. We are referred to Dwarris, Sedgwick, and Smith, on the Construction of Statutes, for the doctrine that an affirmative statute does not take away the common law.

This rule cannot be denied or questioned at this day, for it has been too well and too long established. The language of Lord Coke, that the statute made in the affirmative, without any negative expressed or implied, does not take away the common law, is now elementary, (2 Inst. 200; Stafford *v.* Ingersol, 3 Hill R. 41; Clark *v.* Brown, 18 Wend. R. 220;

Almy *v.* Harris, 5 Johns. R. 175; Wood *v.* Chapin, 13 N. Y. Repts. 521, 526; Hall *v.* Tuttle, 6 Hill's R. 42 Dwárris on Statutes, 638; Smith's Com. on Statute Law, p. 771, § 660). The rule has sprung up under the decisions in regard to remedies, and all that is held is, that if the statute gives a new remedy, and is merely affirmative in its terms, without any negative expressed or implied, it does not take away the common law remedy.

The rule has no application to a case like the present. If the Legislature were to enact a statute expressly declaring that every conveyance of real estate shall be written or printed on parchment, it cannot be doubted that a deed written on common paper would not answer.

Our present statute says, that every grant in fee, or of a free-hold estate, shall be subscribed and sealed by the grantor (1 R. S. 738, § 137).

These are no negative words, and no declartive words that the deed shall be inoperative if not sealed, and yet it has never been doubted that the seal is essential to give it validity.

The fundamental mistake with the Appellant's argument is, in treating this as merely an affirmative declaratory statute. It is no such thing. It introduced a new law in regard to assignments. It required every assignment, whether of real or personal property, to be acknowledged, before an officer authorized to take acknowledgments, before delivery, and the certificate of acknowledgment to be endorsed upon the assignment. The language is peremptory—every assignment, &c., shall be acknowledged before delivery. This, as I have already said, introduces a new rule of law in regard to assignments. "It is, as a maxim, generally true, that if an affirmative statute, which is introductive of a new law, direct a thing to be done *in a certain manner,* that thing shall not, even although there are no negative words, be done in any other manner" (Dwarris on Statutes, 641—9 Law Library, O S.; Smith's Com. on Statutory Law, page 778, § 665). This statute declares that every assingnment in trust for the benefit of creditors, shall be acknowledged before delivery. It is only

necessary to say, that no assignment can be delivered without being acknowledged, without violating the plain mandates of this statute, to perceive that this statute itself contains a clear negative against an assignment being made in any other way.

It is very clear to my mind that a negative of the right to make an assignment in any other manner is implied in the very language of the statute, for when the statute declares, in terms, that every assignment shall be acknowledged before delivery, it, by necessary implication, provides that no *assignment shall be delivered* without acknowledgement.

It clearly denies and witholds the right, which before existed, to dispense with the acknowledgment. We are referred to several adjudged cases, holding some of the subsequent sections of this act to be mererly directory.

The case of Juliand *v.* Rathbone et al. (39 Barb. R. 97) holds that the provisions requiring the assignor, within twenty days after the date of an assignment, to make and deliver to the County Judge an inventory of his debts and assets, were merely directory as to time, and if made after the expiration of the twenty days, it was good. The case also holds that section 3, requiring the assignee, within thirty days after the date of the assignment, to give a bond for the faithful discharge of his duties, was so far directory that his omission to give it within the thirty days would not invalidate the assignment.

The case was rightly decided, and has been affirmed by several subsequent cases (Van Vleet *v.* Slauson, 45 Barb. R. 317; Evans *v.* Chapin, 20 How. R. 289; Barbour *v.* Everson, 16 Abbott's R. 366). These cases were well decided, and repose upon the soundest principles of statute construction. The section which requires the assignor, within twenty days, to make out an inventory of his debts and assets, and deliver the same to the County Judge, containing no negative words against the exercise of the right to make it afterwards, was held to be merely directory as to time, as the statute was entirely silent as to the effect of the omission to do so.

The same was also held in regard to the omission to give the bond within thirty days.

These cases, however, were also placed upon another ground —that as the assignment was properly executed and duly acknowledged and delivered, and possession of the property taken by the assignees, the title of the property passed, and no omission of the assignor, nor his absolute refusal even to make the inventory within the twenty days, could invalidate the assignment, upon the familiar principle that no acts of the assignor, after the assignment has been executed and delivered, and possession of the property taken by the assignees, or any omission on his part, can invalidate the assignment (4 John. Ch. R. 135; 20 N. Y. R. 15; 5 Seld. R. 141, 152; Burrill on Assignments, 304, 306, 308, 309; 6 Barb. R. 91, 94; 33 Barb. R. 127, 135; 24 id. 105; 32 id. 126; 29 Barb. R. 102; Burrill on Assignments, 442 3d, ed.)

This rule applies with equal force to the assignee, if the assignment was valid in its creation. Having been honestly and properly executed and delivered, no subsequent illegal acts, either of omission or commission, can in any manner invalidate it.

The omission or refusal of the assignee to give the bond which the statute makes it his duty to do, might, perhaps, be treated as a refusal to serve; at any rate, it would furnish good ground for his removal by the Court, and the appointment of a receiver to execute the assignment (5 Seld. R. 176; 2 Barb. S. C. R. 446; 5 Paige's R. 46; 8 id. 294; 2 Story's Eq. Jur., § 1289; Burrill on Assignments, 507, 568, 2d ed.; do. 573, 3d ed.; 39 Barb. R. 101, 102).

The Defendant having taken and seized these goods before this assignment was acknowledged, it follows that the assignees could not hold these goods as against these attaching creditors, and that the judgment of the Supreme Court was right, and should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

## FREDERICK E. GIBERT v. ALOIS PETELER AND OTHERS.

*Deed—Conditions—Incumbrance—Ejectment—Improvements.*

A condition in a deed of assignment restricting the assignee from building on a certain portion of the premises, is such an incumbrance as will excuse a party from completing the contract who has purchased without notice of such condition.

A party for whose benefit such condition was inserted has an easement in said premises, and may maintain a suit to enjoin a party from violating such condition.

CLERKE, J.—This action was brought to recover a block of land at New Brighton, county of Richmond, and sundry articles of furniture which the Plaintiff, on the 3d of March, 1858, contracted to sell and convey to the Defendant, Peteler, for $57,500.

The Defendants refused to accept the property and complete the contract, on the ground that the Plaintiff is unable to give a good title to the block of land.

They also set up that, by reason of this failure on the part of the Plaintiff, and of the expense of various improvements upon the premises, made by them in conformity with the con-

---

*Vendor and purchaser—Defective title—Knowledge.* 46 *N. Y.* 392; 157 *N. Y.* 511.

*Land contract—Deposit—Lien—Improvements.* 41 *N. Y.* 448; 120 *N. Y.* 83 (30 *St. Rep.* 266); 23 *Hun,* 507; 38 *Hun,* 253; 46 *Hun,* 231 (11 *St. Rep.* 500; 27 *Week. Dig.* 278); 102 *App. Div.* 46 (92 *N. Y. Supp.* 107); 46 *How. Pr.* 409.

*Covenants—Restrictive—Enforcement.* 70 *N. Y.* 447; 169 *N. Y.* 181; 36 *App. Div.* 617 (55 *N. Y. Supp.* 683); 2 *Abb. N. C.* 62; 52 *How. Pr.* 71; 22 *St. Rep.* 559 (5 *N. Y. Supp.* 99); 47 *St. Rep.* 675 (20 *N. Y. Supp.* 61).

*Deeds—Restrictive covenants—Incumbrances.* 2 *City Ct.* 39.

*Contract—When available third party.* 2 *Misc.* 391 (50 *St. Rep.* 605; 21 *N. Y. Supp.* 986); 2 *City Ct.* 342.

*Contract—Rescission—Restitution.* 73 *N. Y.* 93.

tract, they were entitled to have these expenses paid by the Plaintiff, as a condition of his recovery, and to have them declared a lien upon the premises.

There have been two trials—one before three referees, who found in favor of the Plaintiff; but upon appeal to the General Term, the judgment was reversed.

The second was before one referee, who, in conformity with the decision of the General Term, decided in favor of the Defendants. On appeal to the General Term, the judgment was affirmed.

From that judgment of the General Term, this appeal is taken by the Plaintiff.

The objection to the title arises from a covenant in a deed, dated 30th October, 1846, made by one Bartlett and wife to Samuel M. Fox. Fox covenanted with Bartlett, for himself, his heirs and assigns, not to erect, or suffer to be erected on the permises, any structure or dwelling of any kind whereby the view or prospect of the bay, from any part of the dwelling-house of John C. Green, shall be obstructed, or impaired in any manner or degree whatever. In case of breach, the premises were to be forfeited to Bartlett, for the use of Green, his heirs and assigns.

Bartlett had received from one Davis a deed of the premises, on the 25th of September, 1846. The consideration was paid by said Green, at whose request the deed was taken in the name of Bartlett.

There were several intermediate conveyances prior to the 3d of March, 1858, when the premises were conveyed to the Plaintiff by Victor de Launay, and several other joint owners.

All the conveyances were duly recorded. It is not shown that the Plaintiff had express notice of the covenant referred to, but as the conveyance under which he holds refers to a deed in which it is contained, and as the conveyances are all recorded, it must be assumed that he had notice of it.

The referee finds that the restrictive covenant greatly lessens the value of the Bartlett strip for general purposes, but that it is not essential to the use and enjoyment of the other por-

tions of the property, and that a just amount of compensation, on account of the restriction, might be awarded to the Defendants by proportionate abatement of the purchase-money, and of the interest paid by the Defendants.

He finds that the dwelling of Green, which was then two stories high, was raised, in 1857, another story of about ten feet. The site of the former scuttle on the roof, and of the points of vision therefrom towards the bay, as it formerly existed, is now in the interior of the house, surrounded by walls. By the addition of the third story, an additional view towards the bay was afforded from the windows in the third story, and an increased view from the roof; and in the line of view from the third-story windows to the bay, over the premises in question, any erection thereon to the height of from seven to ten feet would interfere with and interrupt such view.

The Plaintiff was unable to obtain a release of the land from the restriction,, and the Defendants, Hatzfeld & Kober, on the trial elected to rescind the agreement between Plaintiff and Peteler (they being assignees thereof), and recover the damages to which they are entitled against the Plaintiff.

The referee held, as matter of law, that the restriction in the deed from Bartlett to Fox could be enforced on the part of Bartlett by entry, or, on the application of Green, by injunction; and, therefore, that the Plaintiff's title was not good; that the Defendants were entitled to rescind the agreement, and recover their damages against the Plaintiff, which were adjusted at $23,831.26, and were declared to be an equitable lien upon the premises, the payment of which by the Plaintiff is a condition precedent to their recovery, and that until payment the Defendants were entitled to possession.

The principal question for our consideration is,—Was the restrictive clause in the deed from Bartlett to Fox valid? The counsel for the Plaintiff maintains that in no case can any reservation in a deed, either as a condition or as a covenant, be made in favor of a stranger; and that Green, in whose favor this restriction was made, was a stranger.

The counsel maintains that it is not a condition, and refers us to Coke upon Littleton; that the words employed do not constitute a condition, and that such words as "upon condition," or "provided always," must be used in order to make a condition.

But nothing of that kind can be found in that commentary. Undoubtedly, in the note 204*a* (§ 330), it is said that "some words, of themselves, do make a condition, and some others do not, of themselves, make a condition;" but, it is added, "without a conclusion and clause of re-entry"—that is, without a clause of re-entry or forfeiture, the words "upon condition," or "provided always," or some equivalent words, must be employed.

The words in the clause of the deed in question are, that the land shall be forfeited to the grantor, if the grantee, his heirs or assigns, should erect the prohibited construction. This is language as positive as could possibly be employed to make the land described in that deed an estate upon condition; and it makes it no less valid because the thing prohibited is declared to be for the protection or convenience of a person occupying adjoining land.

No principle is better established now than that even under a mere covenant in a deed providing against certain constructions which may be noxious or offensive to neighboring inhabitants in the breach of the covenant, those who have suffered from it, though not parties to the deed, would be afforded relief in equity. Of course they could not sue at common law on the covenant; yet, as the covenant was intended for their benefit, it would be deemed to have given them an easement in the land, and a Court of Equity will interpose to give them relief by injunction against its infraction.

The books abound with cases of this kind. The principal in our own courts are Barrow *v.* Richard (8 Paige, 351), and Brouwer *v.* Jones (23 Barb. 153). It is very possible that, under the rule in Spencer's case (5 Coke, Pt. 6, p. 9—contained also in Smith's Leading Cases, v. 1, p. 129, Phil. ed., 1866), if this provision was merely a covenant, containing no words

of re-entry or forfeiture, that no relief, at a remote period in the history of our law, would be afforded, even by a Court of Equity. In that case, a lessee by indenture covenanted for himself, his executors and administrators, that he, his executors or assigns, would build a brick wall upon part of the land demised. Held, if the lessee assigns his term, such covenant does not bind his assignee, and as the lessee promised to do something in relation to the land, it was something which was merely collateral.

Hence, perhaps, under the rule in that case, a mere promise *not* to erect a building on a part of the land granted, not relating to a thing in esse, would be considered merely collateral, and not binding on the assignee.

Although Spencer's case, and the admirable notes and comments to be found in this recent edition of Smith's Leading Cases, by Mr. Smith and the American editors, contain a fund of learning of great practical utility in the present day, yet it is evident that the case has no application to the present subject, whether we regard the provision in the deed as a covenant merely, or as a condition.

That it is the latter, and, therefore, subjects the land to a forfeiture if the prohibited thing should be done, I think there can be no reasonable doubt.

The referee, was, therefore, substantially correct in finding that the title tendered by the Plaintiff was not a good and sufficient title. The Defendants contracted to purchase the entire property, and they cannot now be compelled to take a part of it, even if proportionate compensation were awarded for the part in respect to which the title is defective.

In the language of Story, "A party contracting for the entirety of an estate will not be compelled to take an aliquot part of it;" referring to Dalby *v.* Pullen (3 Sim., p. 29).

We are next to consider whether the referee was correct in deciding that the Defendants had an equitable lien on the land for the money which they had expended in improvements on it.

We must bear in mind that the Defendants went into pos-

session under contract, which required them to expend $20,000 upon the premises, in permanent improvements, as a necessary condition to entitle them to a deed, and, accordingly, within the time required, they expended that amount in permanently improving the property, upon the faith that, at the appointed time, the Plaintiff would give a sufficient title.

In The Attorney-General *v.* Baliol College (9 Mod. R. 407), Lord Chancellor Hardwicke held that where a lease was good at law, equity will not set it aside without allowing for lasting improvements. But in Putnam *v.* Ritchie (6 Paige, 390) the Chancellor of this State refused to make such an allowance for improvements in favor of a purchaser who had made his expenditures for improvements in good faith, supposing that he was the owner, under a conveyance which turned out to be void. He intimated, however, that his opinion would be different in a case where the legal title was in the person who had made the improvements in good faith, and the equitable title in another, who was compelled to resort to equity for relief.

This hypothetical case would be very similar to that decided by Lord Hardwicke. In Bright *v.* Boyd (1 Story's R., p. 478), in an action for rents and profits after a recovery upon legal title, the owner was compelled to allow a deduction, in favor of a bonâ fide possessor, of the amount expended in good faith for permanent improvements.

This, to be sure, is not exactly the case before us; but the opinion delivered by Mr. Justice Story unequivocally sustains the principle adopted by the Court below, and maintains, as he asserts in his Equity Jurisprudence (2 Story's Eq. Jur., §§ 1234, 1237), that "where a party lawfully in possession under a defective title has made permanent improvements, if relief is asked in equity by the true owner, he will be compelled to allow for such improvements."

King *v.* Thompson (9 Peters, 204), in the U. S. Supreme Court, is perhaps more in point. The Plaintiffs were the vendees, who filed a bill for a specific performance, the legal title being in the Defendants. The specific performance was

denied, on account of uncertainty in the contract as to the person in whom the title was to be vested; but the vendees were allowed their expenditures, and the premises were directed to be sold for the purpose of repaying them.

The case before us is stronger than any of those to which I have referred. The Defendants were lawfully in possession, and not only thought that the Plaintiff could fulfil his promise, but they incurred the expenditure in exact accordance with the requirements upon which the Plaintiff insisted, and which he provided for in the contract.

I have no doubt, therefore, that the conclusions of the referee, relative to the part as well as to the whole of the case, are correct.

The judgment should be affirmed, with costs.

Affirmed.

JOEL TIFFANY,
State Reporter.

---

## THOMAS B. WATSON ET AL., RESPONDENTS, *v.* ANTHONY F. CAMPBELL, SHERIFF, &C., APPELLANT. . .

*Personal Property—Mortgagee—Executory Contract—Void Mortgage—Evidence.*

A party in possession of personal property, having an interest therein as mortgagee, may maintain trespass or replevin therefor against one who wrongfully levies thereon and deprives him of such possession, notwithstanding he has made an executory contract for a sale thereof to another; the possession of the Plaintiff and his lien for the price, are sufficient to entitle him to maintain the action. It is no defence to such an action that the Plaintiff (being mortgagee, and entitled by the terms of his mortgage to possession on default of payment by the mortgagor) obtains the possession by the act of one claimed to be the joint agent of the mortgagor and mortgagee without the consent of the former.

The admission of evidence in its nature incompetent, is no sufficient reason for the reversal of a judgment for the Plaintiff when it is entirely clear that without that evidence the Plaintiff was entitled to a peremptory

---

*Evidence—Immaterial—Disregarding.* 13 *Hun,* 183; 4 *T. & C.* 86.

instruction to the jury to find the fact in the Plaintiff's favor which such improper evidence was offered to prove.

A mortgage made in another State, to secure the payment of money in that State, upon personal property in that State, and made between parties residing in that State, if void by the laws of that Sate, is void here, and must be so declared.

When, therefore, the Plaintiff in an action of trespass de bonis asportatis relied upon his title to the property as mortgagee under a mortgage made in Pennsylvania which was not accompanied by a change of the possession of the property, and it was testified on the trial that, by the law of Pennsylvania, such a mortgage is fraudulent and void, and such evidence is in nowise contradicted, nor the witness impeached, it is error to charge the jury, peremptorily, that the "mortgage is a valid mortgage." Whatever under the special circumstances the law of New York may be, our Courts cannot assume to know, judicially, that the rule stated by the witness is subject to qualifications under which the mortgage might be sustained.

THIS action was brought against the Defendant, who, on the 31st, July, 1861, as Sheriff of the county of Kings, had levied an execution, issued on a judgment against one George R. Ayres, upon a vessel then in the alleged possession of the Plaintiffs, called the barque "Florida."

The Plaintiffs, residing in Philadelphia, claimed title and right of possession under a mortgage dated Nov. 30th, 1858, made to the Plaintiffs by the said George R. Ayres, also a resident of Philadelphia, to secure the payment and satisfaction of all acceptances, notes, endorsements, and other obligations, made or incurred by him to the Plaintiffs, and all which might thereafter become due to them, or which might be lent or advanced by them for his account or accomodation. And in case of default at any time in the payment of any one of the debts, notes, acceptances, or obligations, authorizing the Plaintiffs, or their agent or attorney, to take possession of the said barque "Florida," and to sell her at public auction or private sale, to pay what may be due, &c. The vessel remained in the possession of the mortgagor. The transactions between the parties continued until the spring of 1861. In December, 1860, the vessel sailed from the port of New York to Europe and returned, arriving in New York on the 4th, and was reported on the 5th of June, 1861. Meantime, in April and

May, 1861, certain of the notes secured by the mortgage became due and were not paid, and the Plaintiffs, receiving information of such arrival, instructed Wilson & Camman, of New York, to take possession thereof for them by virtue of the mortgage sent to Wilson & Camman for that purpose. Wilson & Camman had, on the application of Ayres, who was referred to them by the Plaintiffs, consented to advance money to pay off the ship's crew and other expenses.

On the 7th of June, in pursuance of the Plaintiff's instructions, Wilson went on board the ship and took possession on behalf of the Plaintiffs, and when her cargo was discharged, she was removed to the Atlantice Docks and a man placed in charge by them for the Plaintiffs. The Plaintiffs proceeded to negotiate for a sale, and made an agreement of sale to the United States, but on the 31st of July they had not received payment nor delivered the vessel.

On the last named day the Defendant levied thereon an execution on a judgment confessed by the mortgagor to William Ayres, another resident of Philadelphia, and took possession; and for the taking of possession under that execution this action was brought.

It was claimed on the trial that Wilson & Camman were agents of the mortgagor as well as of the mortgagees, and that they could not, by taking possession and putting a man in charge, give to the Plaintiffs any possession of the vessel.

Also, that the vessel having been sold, the action would not lie in the name of the Plaintiffs.

And especially that the mortgage was absolutely void by the laws of Pennsylvania, because it was not accompanied by the possession of the vessel, and that the mortgagor had never consented to the possession of the Plaintiffs.

To prove the law of Pennsylvania, the Plaintiffs examined Maximilian Goepp, who testified that he is a member of the Pennsylvania bar and acquainted with the law of that State. That transfers of personal property, bills of sale, and chattel mortgages, unaccompanied by a change of possession, "are

and always have been, by the law of Pensylvania, *fraudulent* and *void.*" That there is no statute in that State on the subject. No other evidence appeared in the case in regard to the law of Pennsylvania.

Some question in regard to the taking of possession was submitted to the jury; but in reference to the claim that the mortgage was void, the Judge instructed the jury in these terms: "Upon the evidence in this case I charge you that the Plaintiff's mortgage is a valid mortgage."

To this the Defendant excepted.

The Plaintiffs had a verdict and judgment. The judgment being affirmed in the General Term of the Supreme Court in the Second District, the Defendant appealed to this Court.

*Crooke & Bergen* for Appellant.
*J. E. Berry* for Respondents.

WOODRUFF, J.—There is, I think, no serious question in this case, except that which arises from the unqualified charge of the Judge to the jury, that "the Plaintiff's mortgage is a valid mortgage," and therefore that "the only material question for the jury to determine is, whether the Plaintiffs took possession before the levy."

The Plaintiffs, the mortgagees, and Ayres, the mortgagor, resided in Pennsylvania. The mortgage was there made upon the vessel, registered in Pennsylvania, upon which the Defendant levied. The creditor in the judgment upon which the execution was issued, also resided there. Some of the notes which were secured by the mortgage became due and were unpaid. If the mortgage to the Plaintiffs was a valid mortgage, and the Plaintiffs, the mortgagees, were in possession at the time of the levy, then the Plaintiffs were entitled to recover. Those were, in fact, the only questions involved in the controversy.

The jury have found that the Plaintiffs were in possession, and there was evidence to that effect which it was proper to submit to the jury. If, upon the proofs, the Judge was warranted in deciding unqualifiedly that the mortgage was a valid

mortgage, the other questions arising on the Defendant's exception, either to the admission or rejection of evidence, or to his charge, are of no moment, or are clearly untenable.

It was not erroneous to refuse to charge that Wilson could not give up the possession of the vessel without the consent of the mortgagor.

The mortgage debt was in part due, the mortgagees (if the mortgage was valid) had a right to take possession without the consent of the mortgagor, and even in spite of his resistance.

There was evidence that Wilson and his partner acted under express instructions of the mortgagees, and took and held possession on their behalf.

Whether their relations to the mortgagor made it their duty to apprise him, does not alter the result if, in fact, they took possession for the mortgagees.

So it was not erroneous to charge that a sale to the Government, not consummated by delivery, did not prevent a recovery by the Plaintiffs. They had possession, and (even though a sale has been agreed upon) a lien for the price, and a duty to perform, that required continued possession. It requires no argument nor citation of authority to show that this entitled them to maintain trespass or replevin in the cepit against a tort-feasor.

If the Defendant had pleaded as a defence, property in the United States, the cases cited in the appeal might have had some application to the subject (1 Hill, 353; 3 Denio, 244). But even then the possession, with a lien for the price, would sustain the Plaintiffs' action. Without such a plea, the evidence was wholly immaterial.

The Plaintiffs offered in evidence a writing signed by the mortgagor, dated after the levy complained of, certifying the existence and non-payment of the notes given by him to the Plaintiffs. The evidence was objected to, and the Defendant excepted to the ruling by which it was allowed to be read.

I do not perceive any ground upon which that paper, made

after the Defendant had levied, was admissible as evidence against him.

Ayres, the mortgagor, had been examined as a witness on behalf of the Defendant; he had testified, on the driect examination, to nothing which that paper would contradict; and although he had mentioned the signing of a paper, he had not stated its contents. On cross-examination, he had stated that the paper which he signed included a certain note; and even this the paper did not contradict.

The witness, when on the stand, might have been examined as to every fact contained in the paper, if the Plaintiffs desired. On no ground, therefore, was it competent to read against the Defendant such a paper, made out of Court, after the levy, in no sense so connected with the mortgage as to form a part of the res gestæ, and not being one of the vouchers or securities for the debt for which the mortgage was given.

On the other hand, there was no controversy as to the indebtedness, and that was all which this paper certified. The notes were produced, and the liability of the mortgagor therein was not disputed. With this paper out of the case, the Plaintiffs would have been entitled to a peremptory ruling, that the indebtedness was established. If the allowance of the reading of this paper in evidence be the only ground for reversal, the judgment must be affirmed, for it was wholly immaterial, and could in nowise prejudice the Defendant.

In regard to the validity of the mortgage, and the instruction given to the jury on that point, I think the Plaintiffs' case greatly embarrassed by the oral testimony produced by the Defendant, and given by Maximilian Goepp, that "by the law of Pennsylvania, chattel mortgages, unaccompanied by a change of possession, are, and always have been, fraudulent and void."

This testimony stands in the case wholly uncontradicted, and yet it does not appear to have been regarded by the Judge at the trial, or by the Supreme Court in General Term, as of the slightest importance.

It is clear that the validity of the mortgage must be determined by the laws of Pennsylvania, where it was made, where

the vessel was registered, and where all the parties to the mortgage resided (The Aetna Insurance Co. *v.* Aldrich et al., 26 N. Y. 92); and it appears by the testimony of the same witness that "there is no statute in the State of Pennsylvania on the subject."

The testimony, therefore, is to the effect that a chattel mortgage, *unaccompanied* by a change of possession, is, by the common or unwritten law of Pennsylvania, *fraudulent and void.*

Not merely presumptively fraudulent and void, but unqualifiedly so.

Though given in good faith to secure future advances (which would be a perfectly legal consideration), it is void. Though given in good faith to secure an actual advance of money, it is void.

Though, by the terms of the mortgage, the right of possession did not arise till forfeiture by non-payment of the debt, or some part thereof, it is void.

Though the property, at the time of the execution of the mortgage, be so situated that it cannot be presently delivered, as, for instance, a vessel at sea, still the mortgage is void.

Such, I apprehend, is the import of the testimony of this witness. It leaves to the Plaintiffs no room for explanation, no room to say that the want of immediate change of possession is only presumptive evidence of fraud, as held in many of the States; no room to say that the mortgagees did, in fact, take possession as soon as the vessel came within the jurisdiction, and even sooner, by pursuing the property to this State; no room to say that the presumption in case of a mortgage only arises when the debt becomes due (as held in many of the States), and that after forfeiture the Plaintiffs did, in fact, so soon as the vessel returned from sea, take immediate possession.

For be it observed here, that one of the notes secured became due April 15th, another April 24th, and the other two were not yet payable. The vessel left the port of New York for Sicily the previous December, and had not returned when the notes

became due, but arrived at the port of New York June 4th, was reported on the 5th, and on the 7th the Plaintiffs took possession. This was not suffering the mortgagor to remain in possession after forfeiture. Both parties lived in Philadelphia, and very few hours were lost, after advice of the ship's return to the United States, if it was at all the duty of the Plaintiffs to pursue the ship beyond the jurisdiction.

And still further, it left no room to say that although, while the possession of the mortgagor continued, the presumption of fraud, existed yet, when the Plaintiffs did in fact take possession, that presumption ceased, and thenceforth (if in truth the mortgage was given in good faith, to secure an actual indebtedness without intent to defraud) the title of the Plaintiffs under the mortgage was unimpeachable (see Eberle *v.* Mayer, 1 Rawle, 366; Mentz *v.* Hamman, 5 Whart. 150; Hoofsmith *v.* Cope, 6 Whart. 53; Born *v.* Shaw, 29 Penn. State R. 288; Jordan *v.* Brackenridge, 3 id. 442; McVicker *v.* May, 3 id. 224).

Our reading has taught us that, upon some of these questions, there is a diversity of decision in the various States; but the law of Pennsylvania is, in this case, declared by the witness, and it stands uncontradicted, and to the effect that this mortgage was fraudulent and void. How, then, could the Court below say, that because the mortgagees took possession before the levy of the execution, or because of any other fact proved, the mortgage was valid.

On this point, I think, the charge was not warranted; what on another trial the law of Pennsylvania may be proved to be, under the somewhat peculiar situation of the mortgaged property—mortgaged for a debt not due, and not suffered to remain in the possession of the mortgagor after forfeiture—we cannot assume to know.

For the reason stated, the judgment must be reversed, and a new trial ordered, with costs to abide the event.

JOEL TIFFANY,
State Reporter.

## ISAAC G. MILBURN, APPELLANT, *v.* ROBERT BELLONI AND OTHERS, RESPONDENTS.

*Measure of Damages—Warantee—Breach—Natural Consequences.*

In an action for a breach of warantee that the article sold (as brick dust) is of a particular quality (free from soft-dust) and fit for the use for which it was purchased (the making of brick), the rule of damage includes all damage which is the natural consequence of such breach. Thus, if, by containing soft-dust, the brick were injured or destroyed, their value would be included in the damage.

THIS was an action to recover damages for breach of a warrantee in the sale of a quantity of coal-dust, the warrantee being that the dust was free from the dust of soft-coal. At the time of the purchase the Plaintiff was a manufacturer of brick, and purchased the dust in question to be used in combination with other materials in that manufacture.

The referee finds that, at the time of the sale, the Plaintiff inquired if it was free from soft-dust; stated that he would not have it if there was any such intermixture in it, saying that if it had, it would damage or destroy his brick. He also finds that the dust was sold upon a warrantee that it was free from any intermixture of soft-dust.

The dust had an intermixture of soft-dust, which injured, and to some extent destroyed, the brick intended to be manufactured.

The damages sustained in this manner were determined by

---

*Contracts—To manufacture—Construction.* 75 *App. Div.* 385 (78 *N. Y. Supp.* 184); 79 *App. Div.* 114 (79 *N. Y. Supp.* 831); 16 *Misc.* 590 (74 *N. Y. Supp.* 145; 38 *N. Y. Supp.* 804); 59 *Super. ct.* 458 (39 *St. Rep.* 343; 14 *N. Y. Supp.* 964).

*Contracts—Breach—Measure of damages.* 54 *N. Y.* 592; 69 *N. Y.* 69; 71 *N. Y.* 133; 7 *Hun,* 439, 542; 9 *Hun,* 557; 27 *Hun,* 358; 60 *Barb.* 143 (41 *How. Pr.* 20); 4 *Lans.* 105; 5 *Lans.* 328; 5 *N. Y. Supp.* 171 (1 *Silvr. S. ct.* 129).

the referee at the sum of $650, for which sum he reported in favor of the Plaintiff. The General Term of the Second District reversed the judgment entered upon this report, on the ground that the rule of damages was the difference in value, simply, between the article contracted for and the article received.

The Plaintiff appeals to this Court from the order granting a new trial, stipulating that judgment final may be ordered against him in the event of the affirmance of the said order.

*D. C. Ringland* for Appellant.
*Gilbert Dean* for Respondents.

HUNT, CH.J.—The order reversing the report of the referee does not state that it was reversed on the ground of error in fact. It must therefore be held to have been reversed upon questions of law merely (Code, § 272).

In such case, it is settled by numerous decisions, that in its consideration in this Court all facts not expressly stated are to be assumed in support of the report, and that any fact, the reverse of which is not found by the report, may be invoked in its aid (22 N. Y. 323).

There is fair evidence upon which the referee must have found that the vendor warranted the dust as fit for the making of brick.

In the present case, we may upon this principle hold it as the fact, that when the Plaintiff purchased the dust in question, he stated to the Defendants that he wanted it to use in making brick; that if it had in it any soft-dust, it would destroy his brick; that the Defendants sold and warranted it to be used for that purpose, and as free from the objectionable material, and that if it had been so free, it would have made good brick.

It is apparent, from the whole tenor of the report, that such was in truth the understanding and intention of the referee.

In the recent case of Passinger *v.* Thorburn (34 N. Y. 634), all the cases are reviewed by Judge Davies.

There the Defendant had sold a quantity of cabbage-seed,

and had warranted that it would produce Bristol cabbages. It turned out to be seed of an inferior quality, and the crop produced was of little value. Under the rulings of the Judge, the jury gave the Plaintiff, as damages, the value of the crop, as it would have been if of Bristol cabbage, as ordinarily produced that year, deducting the expense of raising the crop, and deducting also the value of the crop actually raised therefrom. This principle was sustained in this Court. The case of Smeed *v.* Foord (1 Ell. & Ell. 602) laid down the rule that the Plaintiff was entitled to recover the damages which are natural consequences of the breach of contract. A machine to be used for thrashing wheat was not delivered at the time agreed upon, in consequence of which the wheat was stacked, and afterwards injured by the rain. This injury, and the loss and expense which it involved, were held to be the natural results of the Defendant's delay.

In Borradaile *v.* Brunton (8 Taunt. R. 535) the loss of the anchor was held to be a natural result of the insufficiency of a cable sold for holding an anchor, warranted to last for two years.

In Brown *v.* Edgington (2 Man. & G. 279) the loss of a pipe of wine by the breaking of a rope attached to a crane, sold for that use, was held to fall properly within the scope of damages for selling an insufficient rope to be used upon such a crane.

The case of Passinger *v.* Thorburn is decisive of the present case.

I think the rule of damages was right, and that the order granting a new trial should be reversed, and that the judgment of the Special Term should be affirmed.

Reversed.

JOEL TIFFANY,
State Reporter.

CHARLES H. BAKER, RESPONDENT, *v.* JOSEPH A. BLISS AND JAMES N. PINNER, IMPLEADED, &C., APPELLANTS.

*Conveyance—Fraud—Resulting Trust—Notice to Purchaser.*

Where an insolvent husband, holding a deed of premises not on record, delivers the same up to his grantor to be canceled, and procures a deed of the same premises to be made to his wife, such deed is fraudulent as to creditors, and void.

A person purchasing such premises under circumstances sufficient to put him on inquiry as to the bonâ fides of such transaction, although he have no actual notice of the fraud, must be deemed to have had constructive notice, and cannot be considered as a bonâ fide purchaser for value.

THIS action was brought to declare and enforce a resulting trust, in favor of the Plaintiff, as the judgment-creditor of the Defendant, Joseph A. Bliss, against certain real estate in the hands of the Defendant Pinner.

On the seventeenth of November, 1859, the Plaintiff recovered a judgment, in the Supreme Court, against Joseph A. Bliss, Defendant, and his copartners (comprising the firm of Bliss, Owen & Co.), on a note of the firm dated February 1st, 1858, for $909.49. The firm had been in business at Tonawanda, where Bliss and Pinner both resided on the sixth of

*Distinguished, Trusts—Resulting—Payment of part of Consideration of conveyance.* 98 *N. Y.* 48; 72 *Hun,* 155(55 *St. Rep.* 351; 25 *N. Y. Supp.* 680).

*Notice.* 71 *Hun,* 186 (54 *St. Rep.* 233; 23 *N. Y. Supp.* 212); 83 *Hun,* 95 (63 *St. Rep.* 855; 31 *N. Y. Supp.* 408); *D.* 86 *Hun,* 254 (66 *St. Rep.* 753; 33 *N. Y. Supp.* 237); 28 *App. Div.* 426 (50 *N. Y. Supp.* 1102); 82 *App. Div.* 382 (81 *N. Y. Supp.* 873).

*Bona fides—Diligence—Notice.* 48 *N. Y.* 340; 76 *N. Y.* 390; 79 *N. Y.* 107; 93 *N. Y.* 125; 143 *N. Y.* 397 (62 *St. Rep.* 443); 147 *N. Y.* 596 (70 *St. Rep.* 352); 19 *Hun,* 566; 24 *Hun,* 456; 26 *Hun,* 556; 27 *Hun,* 363; 85 *Hun,* 287 (66 *St. Rep.* 468; 32 *N. Y. Supp.* 984); 15 *Abb. N. S.* 255 (46 *How, Pr.* 353; 2 *T. & C.* 514); 42 *Super.* 79; 20 *N. Y. Supp.* 44.

July, 1857. Bliss bought a village lot of Henry Hill and wife, for $1,400, and took a contract for the same. He paid a portion of the consideration in money, and gave a note for a portion; and on the fourth of September, 1858, he took a deed of the property. Afterwards, and on the seventeenth of May, 1859, Bliss, who was then insolvent, with the intent to defraud his creditors, redelivered the deed (which had never been recorded) to the attorney of Hill and wife, the grantors, had the seals and signatures torn off, and a new conveyance of the property made to his wife, which was duly recorded on the nineteenth of May.

A judgment was recovered against Bliss for the balance of the purchase-money, and Holbrook, Dee & Co., to whom the judgment was assigned, commenced an action against Bliss and wife, to set aside the conveyance to Mrs. Bliss as fraudulent, and an injunction was obtained restraining the sale of the property.

Pinner was a merchant at Tonawanda, and had been for several years. Bliss had dealth with him, principally by drawing orders on him in favor of third parties. On the twenty-seventh of April, 1859, Bliss owed him $358.83. In May, 1859, he paid him $175 in cash, and on the twenty-eighth of April, 1859, gave him his note for $175, due at the Manufacturers and Traders' Bank in sixty days. This was renewed for some twenty or thirty days, Bliss calling and saying he was not prepared to take it up when due.

The renewed note was not paid. Pinner continued to sell goods to Bliss till about the twenty-sixth of July, 1859, when Bliss ceased to draw orders. Nothing was afterwards paid on the note or on account, though Pinner did all that he could to collect it, as he thought, except to sue. Pinner would not have trusted Bliss for goods, for more than a trifling amount, at any time after July, 1859. On or about the ninth day of January, 1860, Bliss proposed to Pinner to give him a mortgage upon the property in question for the balance due on the note and account, and told him he was going to give his brother a mortgage, also, to raise some money. He said he wanted to make up mortgages to some $700, $800, or $1,000, to secure Pinner,

and raise money for other purposes. Pinner, thereupon, proposed to buy the premises if the title was all right, and offered him $1,000 for them. Bliss wanted $1,200. On the evening of the ninth of January they had another talk. Pinner then told Bliss he would pay him $550 cash, give him his note for $150, and that this, with his debt, would make $1,000. Bliss accepted, and it was agreed that Pinner, Bliss and his wife, should go to Buffalo the next day to close the trade.

The terms of the sale were substantially settled before Bliss communicated with his wife on the subject. Pinner had no notice of the deed to Bliss. On the tenth they went to Buffalo, and there Pinner employed an attorney to investigate the title. The attorney was not informed of anything to indicate that Bliss was in debt, or that he had or might be claimed to have any interest in the premises, except that he was informed in some way that the action, before alluded to, had been brought by Holbrook, Dee & Co. against Bliss and wife; that an injunction had been obtained in it against disposing of the land, and that the suit was brought by Holbrook, Dee & Co. to *recover a debt against Bliss,* about this property.

He sent his clerk to the clerk's office, who examined the records, and who, on his return, told him there was nothing in the records against Mrs. Bliss; and thereupon he advised Pinner that the title was good.

They then went to the office of the attorney of Holbrook, Dee & Co. Pinner gave him the money with which to raise the injunction, and he went out and presently returned with a release thereof; and the deed was then delivered, and the rest of the money paid, and Bliss took Pinner's note and the balance of the money.

At the time Pinner received the conveyance from Mrs. Bliss, he had been informed, and believed, that the action brought by Holbrook, Dee & Co., in which the injunction had been obtained, was commenced *to recover a debt against Bliss for a part of the purchase-money of the premises.* He had also heard and supposed that Bliss had paid a part of the purchase-money of said premises, and had purchased the property.

He had learned, from common report, that Bliss, Owen &

Co. had failed. He also knew of some other outstanding debts against Bliss.

The action was referred to the Hon. Nathan K. Hall, as referee, who found that the conveyance to Bliss's wife was fraudulent; that Pinner had no actual notice of the fraud, that there was a resulting trust, knowledge or notice of the facts which rendered the deed fraudulent and void as against creditors; and as a matter of law, that the facts proved were sufficient to put Pinner upon inquiry, and amounted in law to constructive notice, and rendered judgment in favor of the Plaintiff.

Exceptions were taken to his report, and upon appeal to the General Term, the judgment was affirmed with some modifications, not material to be stated, and the Defendants appealed to this Court.

*Asher P. Nichols* for Appellant.
*Sherman S. Rogers* for Respondent.

MILLER, J.—It is declared by 1 R. S. 728, § 51, that "Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section."

The next section (52) provides that "Every such conveyance shall be presumed fraudulent, as against the creditors, at that time, of the person paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that may be necessary to satisfy their just demands." A subsequent section (54) contains a saving in favor of the purchaser for a valuable consideration without notice of the trust.

The premises in question in this case were purchased by Joseph A. Bliss, and the purchase-money mainly paid by him, prior to the conveyance to his wife. After the conveyance was made to the husband, the deed to him was destroyed, and another deed executed by the grantors, by the direction of the hus-

band, to the wife. Under this state of facts, there can be no question that the conveyance to Mrs. Bliss was fraudulent as against the creditors of her husband, to whom he was indebted at the time, and that they were entitled to the benefits arising from the property, to the extent of their demands, except as against a bona fide purchaser.

The Defendant, Pinner, paid a valuable consideration for the purchase of the property, and whether he was or was not a purchaser for value, depends upon the fact whether he had actual notice of the facts existing in reference to the title, or what, in law, is equivalent to such notice, such knowledge as to put him upon inquiry.

There is no evidence to show that Pinner had actual knowledge of the facts, and his own testimony establishes that he did not have such knowledge. The referee has also found that, at the time Pinner paid for and received the conveyance, he had no actual notice or knowledge of the facts which rendered the conveyance fraudulent and void as against creditors, or created a resulting trust in their favor, but that he had sufficient knowledge to put him upon inquiry, and that such knowledge was equivalent to notice, and in law amounted to constructive notice, and entitled the Plaintiff to judgment.

The question then arises, whether the facts presented upon the trial sustain the conclusion of the referee, that there was sufficient evidence to put Pinner upon inquiry. Before discussing the legitimate effect resulting from the facts proved, it may be well to refer to the principles which govern and control cases of this character. In Williamson *v.* Brown (15 N. Y. 362), Selden, J., lays down the rule, "that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a bona fide purchaser." (See also 4 Kent's Com. 179; Hinde *v.* Vattier, 1 McLean, 110; Nantz *v.* McPherson, 7 Mon. 599; Cotton *v.* Hart, 1 A. K. Marshall, 56; Woodpour *v.* Blount, 3 Hay. 147; Harris *v.* Carter,

3 Stewart, 233; Benzein *v.* Lenoir, 1 Dev. Eq. R. 225; Hawley *v.* Cramer, 4 Cow. 718.)

To charge a party with notice, the circumstances known by him must be such as ought reasonably to have excited his suspicion, and to have led him to inquire.

It appears to me that, in the case at bar, there were many facts within the knowledge of Pinner which were calculated to arouse his suspicions, and to put him upon inquiry. He was a creditor of Bliss, and his debt had been due since about the first day of July, 1859, and he had made ineffectual efforts to secure or collect it by negotiations with Bliss for security by mortgage upon the property finally conveyed to him. He had been informed that the firm, of which Bliss was a member, had failed, and after July, 1859, he refused to trust Bliss. He also had notice that Bliss had paid a portion of the purchase-money for the land, and that he still was indebted for the remainder. He knew that a suit had been brought to collect the unpaid purchase-money out of the property, that an injunction had been issued restraining its sale, and that it was removed by his paying a portion of the consideration money he had agreed to pay for the premises to liquidate the demand.

He was also acquainted with the fact that Bliss owed other debts and demands, and that the conveyance had been made to his wife, on the nineteenth of May, previous to the time when Bliss had failed to meet Pinner's note.

It is very evident to my mind that the facts to which I have adverted were quite enough to excite suspicion, and to put Pinner upon his guard; and in the exercise of that caution and diligence which men are accustomed to exercise in making purchases of property, he had strong reason to suppose and believe that the premises belonged actually to the husband, and that the conveyance was made to the wife for the purpose of placing the property beyond the reach of his creditors. He was therefore, I think, clearly bound to make inquiry as to the facts existing in regard to the title, and the grounds upon which the suit had been commenced, and the injunction issued.

Had he merely procured an examination of the papers in the injunction case, it would have disclosed the fact that the pur-

chase-money of the property had been paid by Bliss, if not already known, and that the property was liable for the payment of his debts. This would also have led to the further development of the existence of the judgment against Bliss, and an examination of the record would no doubt have disclosed the fact that the indebtedness had accrued prior to the conveyance to Mrs. Bliss. With the negotiations made with Bliss himself, to secure Pinner's demand against him out of real estate, the title of which was in his wife's name, and the suspicious circumstances which pervaded the whole transaction, it is difficult to conceive how Pinner could have failed to discover the fraudulent character of the transaction. At least, with the information and knowledge which he had, how he could have neglected to make a further examination, which must inevitably have led to a revelation of the fact that the husband, and not the wife was the actual owner of the property.

Although the question involved is one of good faith, yet in judgment of law a want of caution and diligence, such as an honest man would ordinarily exercise, is a want of good faith (Pringle *v.* Phillips, 5 Sand. Sup. C. R. 157; Danforth *v.* Dart, 4 Duer, 101). And Piner having failed to exercise that cauion and diligence, the referee was entirely justified in the conclusion at which he arrived upon the question presented to him.

It is said that the fact that the referee finds that Bliss was insolvent at the time of the delivery of the deed to his wife, is unimportant, as Pinner did not know it. The referee has found certain facts, from which he has drawn the conclusion that Pinner ought to have made inquiry; and even if we assume that Pinner did not know that Bliss was insolvent at the time of the conveyance to his wife, Pinner's want of knowledge of that fact is not entirely conclusive, provided he had sufficient knowledge of the facts to call into exercise his caution and prudence, and to cause him to make inquiry. As is already apparent, there were many circumstances which indicate that he ought to have made inquiry. He had been informed that the firm of which Bliss was a member had failed. He knew that Bliss himself, a few weeks after the deed to his wife, had failed to meet his engagement, and again, very soon afterwards, had not paid his renew-

ed note, and was considered irresponsible after this. These facts transpired some time before the conveyance to Piner, and in connection with what he had learned prior to this time as to the existence of the injunction, and of debts against Bliss, with other circumstances not necessary to be stated, tended to prove that Bliss's insolvency must have dated back anterior to the time when the property was conveyed to his wife.

If these facts did not satisfy Pinner upon that question, certainly they were enough to induce him to investigate and ascertain what the actual condition of Bliss was in a pecuniary point of view.

The existence of insolvency at any time of itself would naturally lead to the inquiry as to how far back it extended as to time. Especially would this be the case when it was proposed to secure the debt of the insolvent by a lien on the real estate held in the name of the wife, as was done here; and it cannot be fairly and reasonably claimed, I think, that the pecuniary circumstances of Bliss, as known to Pinner, when he took the deed, were not of such a character as to attract his attention.

The period of time during which the facts relating to the transaction occurred was not very extended, and the case before us bears no analogy to Frazer *v.* Western (1 Barb. Ch. R. 220), to which we have been referred by the counsel for the Defendant, where the insolvency of the husband existed, and the conveyance was made to the wife, five years prior to the transfer by the wife to another party, and that party had no acquaintance with the husband or his circumstances, so as to make it his duty to inquire whether the deed was fraudulent.

In this case, independent of the fact that Pinner knew that the deed was not founded upon a pecuniary consideration, as is manifest, there were other circumstances which stamped the conveyance of the property to the wife as a fraud upon creditors, which should have awakened inquiry. The fact that Pinner advised with counsel does not, I think, relieve him from the consequence of his failure to make inquiry.

The judgment must be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

# INDEX.

## A

PAGE

ACCEPTANCE OF DRAFT—Promise—Authority..... 138
See DRAFT.

ACKONWLEDGMENT—Assignment for benefit of Creditors—Construction of Statute of 1860..... 323
See ASSIGNMENT.

ACTION, LIMITATION OF—Corporation—Directors as Grantors 146
See CORPORATION.

ADMIRALTY JURISDICTION—Lien on Vessels—Statute of 1862 5
See LIEN ON VESSELS.

AGENT, PRINCIPAL AND—Fraud—Evidence—Credibility..... 227
See PRINCIPAL AND AGENT.

AGREEMENT, USURIOUS—Validity of Mortgage..... 282
See MORTGAGE.

ALIEN ENEMY—Rebellion—Pleading—Demurrer ..... 308
See PLEADING.

ALLEGATIONS OF ANSWER—Defences—Escape—Trover and Conversion—Judgment—Execution against the Person..... 203
See ESCAPE.

ANSWER, ALLEGATIONS IN—Defences—Escape—Trover and Conversion—Judgment—Execution against the Person..... 203
See ESCAPE.

APPEAL, CASE ON—Findings of Fact—Contract—Parol Evidence 44
See CONTRACT. 3

ASSIGNMENT FOR BENEFIT OF CREDITORS—*Acknowledgment—Construction of Statute of* 1860.] An assignment of real or personal property for the benefit of creditors must be in writing, and be acknowledged before delivery, in the presence of some officer authorized to take the acknowledgment of deeds, or it will be inoperative to vest the title in the assignee.

A statute prescribing the mode of making and executing conveyances of property to make them operative, may be altogether affirmative in its requirements, and yet by implication be strongly negative

HARDMAN *v.* BOWEN..... 323

PAGE

ASSIGNMENT OF POLICY OF INSURANCE—Consent of Insurer ..... 286
See INSURANCE.
——— Set-off—Tort Contract—Judgment ..... 253
See SET-OFF.
AUTHORITY—Promise to Accept Draft ..... 138
See DRAFT.

B

BAILEE, NEGLIGENCE OF—Bailment—Common Carrier—Delivery of Freight ..... 311
See BAILMENT.
——— OF ONE COPARTNER—Copartnership—Replevin ..... 142
See REPLEVIN.
BAILMENT—*Common Carrier—Delivery of Freight—Negligence of Bailee.*] To establish the liability of a common carrier, it must be proved that the property was actually delivered to and accepted by the carrier, or some person authorized by him to receive the same. It is not enough that the property is delivered upon the premises, unless the delivery is accompanied by notice to the carrier or his agent ..... 311
GROSVENOR *v.* NEW YORK CENTRAL R. R. CO.
BENEFIT OF CREDITORS, ASSIGNMENT FOR—Acknowledgment—Construction of Statute of 1860 ..... 323
See ASSIGNMENT.
BONA FIDE PURCHASER—Vendor—Fraud—Delivery—Divisibility of Contract ..... 207
See VENDOR.
BREACH OF LEASE—Forfeiture—Ejectment ..... 296
See EJECTMENT.
——— WARRANTEE—Natural Consequences—Measure of Damages ..... 343
See MEASURE OF DAMAGES...
BROKER'S COMMISSIONS—Evidence—Inference ..... 320
See COMMISSIONS.

C

CAPACITY, MENTAL—Evidence—Donatio Causa Mortis—Sufficiency of Execution ..... 53
See DONATIO.
CAPITAL—Corporation—Taxation—Statute—Real Estate—Certiorari ..... 116
See CORPORATIONS..
CARRIER, COMMON—Bailment—Delivery of Freight—Negligence of Bailee ..... 311
See BAILMENT.
——— RIGHTS OF—Loss in Transitu—Contract—Freight Money—Insurance ..... 69
See CONTRACT. 2.

PAGE

CASE ON APPEAL—Findings of Fact—Contract—Parol Evidence 44
See CONTRACT. 3

CAUSE OF ACTION—Limitation of Policy of Insurance—Conditions ..... 244
See INSURANCE.

CERTIORARI—Corporations—Capital—Real Estate Taxation—Statute ..... 116
See CORPORATIONS. 2.

——————— Statutory Writ in Summary Proceedings is not a Common Law—Peremptory Challenge..... 219
See SUMMARY PROCEEDINGS.

CHALLENGE, PEREMPTORY, Parties in Summary Proceedings are not entitled to—Certiorari..... 219
See SUMMARY PROCEEDINGS.

CHATTELS, GOODS AND—Vendor—Possession—Warrantee..... 132
See GOODS AND CHATTELS.

CLAIM AGAINST THE GOVERNMENT—Value of Services—Opinion of Witness..... 223
See EVIDENCE. 3.

CLERK'S MINUTES—Testimony—Question—Responsiveness—Evidence ..... 65
See TESTIMONY.

COMMISSION BROKER—*Evidence—Inference.*] Where a broker has been employed to sell real estate, and has advertised the same, and a sale is effected in his presence, it may be presumed that he procured it to be made, even though he do not prove that fact by positive evidence.
REDFIELD *v.* TEGG.....320

COMMISSIONS—Trustees—Foreign Corporations—Custody..... 129
See TRUSTEES.

COMMON CARRIER—Delivery of Freight—Negligence of Bailee.. 311
See BAILMENT.

COMPLAINT—*Demurrer—Proper Parties—Leave to Plead.*] When a pleading is sustained—the demurrer being overruled—and leave is given to answer the pleading, the demurrant is put to his election to answer over or submit to judgment, and if he submit to judgment it is final.
On an appeal from such judgment to this Court the appeal comes here on the question of affirmance or reversal only, and no leave to plead anew can be given.
WHITING *v.* MAYOR, &c..... 193

——————— DISMISSAL OF—*Contract—Part Performance.*] Where the Plaintiff disqualifies himself from completing his contract by reason of his intemperance, and is for that reason discharged, he cannot recover thereon.
HUNTINGTON *v.* CLAFLIN..... 168

CONDITION—Deed—Incumbrance—Ejectment—Improvement ..... 329
See DEED.

——————— OF POLICY OF INSURANCE—Limitation of Cause of Action..... 244
See INSURANCE. 2.

PAGE

——————— Survey ..... 316
See INSURANCE...3.

CONSENT OF INSURER—Assignment of Policy ..... 286
See INSURANCE.

CONSEQUENCES, NATURAL—Warrantee—Breach—Measure of Damages ..... 343
See MEASURE OF DAMAGES.

CONSIDERATION—Promissory Note—Surrender of Old Note.... 302
See PROMISSORY NOTE.

CONSTITUTIONALITY—Metropolitan Health Bill—Divisions of State—Judicial Powers ..... 170
See METROPOLITAN HEALTH BILL.

CONSTRUCTION OF CONTRACT—Fraud—Rescission—Evidence—Explanation ..... 290
See CONTRACT.

——————— STATUTE OF 1860—Acknowledgment of Assignment for the Benefit of Creditors ..... 323
See ASSIGNMENT.

CONTRACT,. CONSTRUCTION. OF—*Fraud—Rescission—Evidence—Explanation.*] Under a contract to deliver a thousand tons of ground bark per year, for five years, the party has the whole of each year to deliver the one thousand tons for that year—that is, the promisor is entitled to the whole year in which to make the payment.

When, from the language of the contract, there can be no uncertainty as to its meaning, evidence is not admissible to explain the contract.

CURTIS *v.* HOWELL ..... 290

——————Divisibility of—Vendor—Fraud—Bonâ Fide Purchaser—Delivery ..... 207
See VENDOR.

——————EXECUTORY—Personal Property—Mortgagee—Void Mortgage—Evidence ..... 335
See PERSONAL PROPERTY.

2. ——————*Freight Money—Insurance—Loss in Transitu—Rights of Carrier.*] Where an insurance was effected on goods by request of the shipper, at the place of shipment, and made payable, in case of loss, to the owner or his shipping agent, the circumstance that the sum insured was, by request of such agent, made sufficient to cover the cost of the goods and the freight to their destination, does not create any presumption that the carrier's interest in the freight was protected, nor entitle the carrier (after a loss on the voyage and payment of the sum insured to the owner of the goods) to maintain an action against the latter for so much money had and received to his use.

The voluntary payment of the premium by the carrier to the insurance company after the loss, does not affect the question.

Where in such case the boat containing the goods was, without any fault of the carrier, sunk on the voyage in a canal-basin, and the goods were damaged, but the carrier was ready and willing, and offered to render all due assistance in recovering the goods,

PAGE

and to carry them forward to their destination, in full performance of his agreement to carry, but, the owner having surrendered all his interest in the goods to the insurance company, the agents of the latter accepted the damaged goods at the place of the accident, and voluntarily relieved the carrier from his duty to carry further—*Held,* that the carrier was entitled to freight, pro rata itineris.

As between the owner and the carrier, the act of the insurance company in accepting the goods at the place of the accident, is to be deemed warranted by the owner's surrender of his interest to them, and, therefore, to be the act of the owner himself; and he is, therefore, liable to the carrier for a just proportion of the whole freight, pro rata itineris.

McKibbin *v.* Peck..... 69

3. CONTRACT—*Parol Evidence—Ironmongery—Case on Appeal—Findings of Fact.*] Construction of a contract—meaning of "Ironmongery,"—admissibility of parol evidence of the time and circumstances of the drawing of a contract, and the additions or supplementary clauses thereto, to throw light on the meaning and intention of the parties.

Porter *v.* Spence..... 44

4. ———— *Parol evidence—Explanation.* When, according to the terms of a written contract between the parties, a part of the payment to be made consisted in an order for five hundred dollars, to be given on Messrs. W. & T.—

*Held,* that parol evidence was admissible to show whether the order was to be for the payment of money, or for the payment of five hundred dollars in sash and blinds, manufactured by said W. & T.

Hinneman *v.* Rosenback..... 257

5. ———— *Parol Evidence—Nonsuit.*]

Newkirk *v.* N. Y. & Harlem R. R. Co. ..... 196

———— Part Performance—Complaint—Dismissal..... 168

See Complaint. 2.

———— Principal and Surety—Statute of Frauds—Entire Performance ..... 94

See Statute of Frauds.

6. ———— *Specific Performance—Waste—Measure of Damages.*] When a Court of Equity decrees the specific performance of a a contract for the conveyance of land, it will proceed to give full and complete relief by awarding to the Plaintiff the damages which he has sustained by being kept out of possession, and also the damages by waste committed by the Defendant.

And such damage will be allowed down to the time of the final assessment, although the litigation may have been prolonged for many years after the interlocutory decree, which declares the Plaintiff's title to specific performance. Damages for waste should be ascertained by the value of the wood, timber, and other property carried away by Defendant, and interest thereon should be allowed from the time when the Plaintiff is let into possession of the premises, and down to the final assessment.

PAGE

The general rule for the allowance of damages to the Plaintiff for being kept out of possession is to treat the vendor as trustee of the purchaser in respect of the land, and accountable for the rents and profits, or value of the use and occupation; and the purchaser, if the purchase-money has not been paid, will be charged with interest. But this rule is not invariable, and its aplication will be varied by special circumstances.

When, as in the present case, the value of the land consited chiefly in valuable clay pits thereon, to be made productive by consuming the clay in brick-making, and the land was of trifling value for any other use, the purchaser, having paid the purchase-money, should be allowed an annual sum as damages equal to interest on the purchase-money, and also interest on each annual sum down to the time of the assessment.

WORRALL *v.* MUNN..... 100

CONTRACT—Tort—Judgment—Assignment—Set-off ..... 253

See SET-OFF.

CONTRIBUTORY NEGLIGENCE—*Nonsuit—Question for Jury.*]

A traveler approaching a railroad track crossing the highway is bound to use his eyes and his ears so far as there is opportunity.

Negligence in the railroad company in omitting to give proper signals of the approach of a train, will not excuse the traveler's omission to use such means of avoiding collision. And where by such use of his senses the traveler might avoid collision, his omission to do so is concurring negligence, and should be so declared by the Court; where proof of this is clear the Plaintiff (alleging injury by collision with the train) should be nonsuited.

But where it is doubtful, under all the proofs, whether the traveler did or did not look up and down the track, and in other respects use ordinary care and prudence, so that honest and intelligent men may reasonably differ in their conclusions, the question whether the Plaintiff was negligent should be left to the jury.

It cannot be said that it is the duty of a railroad company to place a flagman or display a flag at a street-crossing to notify travelers or foot passengers of the approach of trains. Doing so may enable the trains to be properly run at greater speed, and with less caution on the part of those who conduct the train, but it is not a duty.

But the voluntary and uniform practice of the company to display such a flag at a particular crossing, generally known to persons using the street, may render its omission a culpable neglect, unless increased vigilance and care in the management of the train, or other precautions, furnished equivalent assurance of safety.

ERNST *v.* HUDSON RIVER R. R. Co..... 35

CONVERSATION WITH DECEASED—Evidence—Counts of Indictment—Election ..... 84

See INDICTMENT.

CONVERSION, TROVER AND—Judgment—Execution against the Person—Escape—Defences—Allegations of Answer..... 203

See ESCAPE.

PAGE

CONVEYANCE—*Fraud—Resulting Trust—Notice to Purchaser.*] Where an insolvent husband, holding a deed of premises not on record, delivers the same up to his grantor to be canceled, and procures a deed of the same premises to be made to his wife, such deed is fraudulent as to creditors, and void.

A person purchasing such premises under circumstances sufficient to put him on inquiry as to the bonâ fides of such transaction, although he have no actual notice of the fraud, must be deemed to have had constructive notice, and cannot be considered as a bonâ fide purchaser for value.

BAKER *v.* BLISS ..... 346

COPARTNER, BAILEE OF ONE—Copartnership—Replevin ..... 142

See REPLEVIN.

COPARTNERSHIP—Replevin—Bailee of one Copartner ..... 142

See REPLEVIN.

CORPORATION—*Directors as Grantors—Limitation of Action.*] Where a majority of the directors of the company are grantees of the franchises of the company, they cannot buy of themselves the grant for the company, nor can they create, renew, or continue a debt against the company to themselves, by passing resolutions as directors.

COLEMAN *v.* SECOND AVE. R. R. CO. ..... 146

CORPORATION, FOREIGN—Eminent Domain—Retroactive Legislation—Unconstitutionality ..... 266

See EMINENT DOMAIN.

CORPORATIONS, FOREIGN—Trustees—Commissions—Custody .. 129

See TRUSTEES.

2. ——————— *Taxation—Statute—Capital—Real Estate—Certiorari.*] As against corporations, the rule of taxation is just when based upon the amount of capital paid in, or secured to be paid in, after deducting therefrom the amount of such capital actually paid for real estate, assessing the remaining capital at its actual value, and leaving the real estate to be assessed upon individuals in the town or ward where situated.

The mains, or under-ground pipes of a gas company, under the streets of a city, cannot be regarded as real estate, under the statute, for the purpose of taxation.

The office of the writ of certiorari, sued out of the Supreme Court to review the proceedings and determinations of inferior tribunals, extends to the review of all questions of jurisdiction, power, and authority of the inferior tribunals to do the act complained of; and to all questions of regularity in the proceedings.

The judgment of the Supreme Court upon these questions of regularity, jurisdiction, etc., is reviewable in this Court.

THE PEOPLE EX REL. CITIZENS' GAS LIGHT CO. *v.* BOARD OF ASSESSORS OF THE CITY OF BROOKLYN ..... 116

COUNTS OF INDICTMENT—Election—Evidence—Conversation with Deceased ..... 84

See INDICTMENT.

PAGE

CREDIBILITY—Evidence—Fraud—Principal and Agent..... 227
See PRINCIPAL AND AGENT.

CREDITORS, ASSIGNMENT FOR BENEFIT OF—Acknowledgment—Construction of Statute of 1860..... 323
See ASSIGNMENT.

CRIMINAL, NAME OF—Indictment—Degrees of Murder..... 19
See INDICTMENT. 2.

CUSTODY—Trustees—Commission—Foreign Corporations..... 129
See TRUSTEES.

D

DAMAGES, MEASURE OF—Contract—Specific Performance—Waste ..... 100
See CONTRACT. 6.

——————— Warrantee—Breach—Natural Consequences ..... 343
See MEASURE OF DAMAGES.

DECEASED, CONVERSATION WITH—Evidence—Indictment—Counts—Election ..... 84
See INDICTMENT.

DEED — *Condition—Encumbrance — Ejectment—Improvements.*] A condition in a deed of assignment restricting the assignee from building on a certain portion of the premises, is such an incumbrance as will excuse a party from completing the contract who has purchased without notice of such condition.

A party for whose benefit such condition was inserted has an easement in said premises, and may maintain a suit to enjoin a party from violating such condition.

GIBERT *v.* PETELER ..... 329

DEFENCES—Allegations of Answer—Escape—Trover and Conversion—Judgment—Execution against the Person..... 203
See ESCAPE.

DEGREES OF MURDER—Indictment—Name of Criminal..... 19
See INDICTMENT. 2.

DELIVERY — Bonâ Fide Purchase — Vendor—Fraud—Contract—Divisibility ..... 207
See VENDOR.

——————— OF FREIGHT—Negligence of Bailee—Bailment—Common Council..... 311
See BAILMENT.

DEMURRER—Complaint—Proper Parties—Leave to Plead..... 193
See COMPLAINT.

——————— Pleading—Alien Enemy—Rebellion..... 308
See PLEADING.

DEPOSITION—*Evidence.*].
SANDFORD *v.* RUCKMAN..... 68

DIRECTORS AS GRANTORS—Corporation—Limitation of Action 146
See CORPORATION.

DISMISSAL OF COMPLAINT—Contract—Part Performance.... 168
See COMPLAINT. 2.

PAGE

DIVISIBILITY OF CONTRACT—Vendor—Fraud—Bonâ Fide Purchaser—Delivery ..... 207
See VENDOR.

DIVISIONS OF STATE—Metropolitan Health Bill—Constitutionality—Judicial Powers ..... 170
See METROPOLITAN HEALTH BILL.

DONATIO CAUSA MORTIS—*Sufficiency of Execution—Mental Capacity—Evidence.*] The Defendant held in her possession certain moneys of her sister—the Plaintiff's intestate—for which she had delivered the following receipt:—

"Received, Brooklyn, May 21st, 1863, from J. Hegeman, twenty-eight hundred and three dollars and fifty cents. Also, June 1st, five hundred dollars from A. S. Foster, both of which sums are on account of, and belonging to, Mrs. Mary Champney, and are to be disposed of in any manner she may direct, or paid to her individually, together with whatsoever interest I may obtain for their use.

"F. BLANCHARD."

The intestate, in the morning of the day of her decease, in contemplation of death, delivered the receipt to the Defendant, declaring that she gave it to her, mentioning the amount, and saying that she gave that money to her. The Defendant received and retained the receipt.

In an action by the administrator of the intestate, *Held,* that that this was a valid gift mortis causa.

A general objection made, when a deposition is offered in evidence, "to all such parts thereof as involve the opinion of the witness on the mental capacity of the deceased" raises no question for review on appeal. The objection should have been to specific answers. The Court cannot be called upon to scrutinize the various answers, to discover whether there are any to which such an objection would apply, and the Appellant's exception in such case is unavailing.

CHAMPNEY *v.* BLANCHARD ..... 53

DRAFT—*Promise to accept—Authority.*] An agreement by telegram to accept a draft to be drawn upon the party sending the despatch, by the party named therein, is equivalent to an acceptance of such draft.

Authority to draw at twenty day's sight is not an authority to draw at twenty days from date.

But a failure to make the right form of the draft does not preclude the party from making a second draft, so as to comply literally with the authority to draw.

JOHNSON *v.* CLARK ..... 138

E

EJECTMENT—Improvements—Deed—Condition—Incumbrance .... 329
See DEED.

——————— *Lease—Breach—Forfeiture.*] In an action of ejectment brought to recover the possession of lands held by the De-

PAGE

fendant under a grant in fee reserving rent, proof of a conveyance forty years before the commencement of the suit, to one from whom the Plaintiff derives title, proof of her grant reserving rent, and proof of the payment of rent to her heir-at-law, and subsequent grantees by the successive tenants, including the Defendant, sufficiently establish the title of the original grantee as against the tenants in possession.

Where a grant in fee reserving rent contains the express condition that if the rent shall be unpaid at the time appointed for the payment thereof, then the grant and the estate demised are to be void, determine and cease, and thereupon it shall be lawful for the grantor, his heirs and assigns, to re-enter, &c., it is not necessary for the Plaintiff in the ejectment brought for a breach of such condition to prove a demand of the rent.

The common law rule requiring such demand, on the premises, on the day, and for the precise amount, is abrogated by the statute which makes the commencement of the action of ejectment stand in place of such demand; and this statute applies as well to a grant in fee reserving rent as to a lease for years or other term less than a fee.

The statute of 1846, requiring fifteen days' notice of an intention to re-enter, does not apply to a grant in which the right to re-enter arises on default of payment by the tenant, but only where such right depends on the sufficiency of goods whereon to distrain.

HOSFORD *v.* BALLARD ..... 296

ELECTION—Counts of Indictment—Evidence—Conversation with Deceased ..... 84

See INDICTMENT.

EMINENT DOMAIN—*Foreign Corporation—Retroactive Legislation—Unconstitutionality.*] An Act of the Legislature taking land in this State for a public use is not unconstitutional because the instrumentality employed for that purpose is a corporation created by the laws of another State:

Nor because such corporation derives a pecuniary benefit from the use of the land so appropriated:

Nor because the lands appropriated are to be used for the maintenance of a navigable canal which runs along the border of the State, but without its limits.

If the use be in its nature public, the Legislature are the sole judges of the question whether the benefit to our citizens or to the State is such as to warrant the taking of private property therefor: and are also the sole judges of the question what supervision or control over the use should be retained in order to secure the contemplated public benefits.

But where such lands have been already taken or apropriated without authority, or have been injured by the construction of such canal and a reservoir of water therefor by flooding, &c., an act of the Legislature, authorizing the appointment of commissioners to appraise the damages already sustained, and making

PAGE

their award and the payment or tender of the sum awarded a bar to any action by the owners to recover such damages, is unconstitutional and void.

The party injured has a right to maintain his action and have a trial by jury, and cannot constitutionally be required, by retroactive legislation, to submit his cause of action to a tribunal not proceeding according to the course of the common law.

MATTER OF TOWNSEND, AND MORRIS CANAL & BANKING CO... 266

ENDORSER—Promissory Note—Specified Residence—Protest—Notice ..... 159

See PROMISSORY NOTE.

ENEMY, ALIEN—Rebellion—Pleading—Demurrer..... 308

See PLEADING.

ENTIRE PERFORMANCE—Contract—Statute of Frauds—Principal and Surety ..... 94

See STATUTE OF FRAUDS.

ERROR—Evidence—Grounds of Objection—New Trial..... 241

See EVIDENCE. 2.

ESCAPE—*Defences—Allegations of Answer—Trover and Conversion—Judgment—Execution against the Person.*] In an action brought against a Sheriff for an escape, the Defendant, to avail himself of the defence that the prisoner escaping was recaptured before suit brought, must set it up in his answer.

So also, that he was prevented from recapturing the prisoner through the fraud of the Plaintiff.

It seems, that on a judgment in an action for the wrongful conversion of personal property, the Plaintiff is entitled to an execution against the body of the Defendant.

RICHTMYER *v.* REMSEN..... 203

ESTATE, REAL—Corporations—Capital—Taxation—Statute—Certiorari ..... 116

See CORPORATIONS. 2.

EVIDENCE—Clerk's Minutes—Testimony—Question—Responsiveness ..... 65

See TESTIMONY.

EVIDENCE—Conversation with Deceased—Indictment Counts—Election ..... 84

See INDICTMENT.

——————*Deposition*].

SANDFORD *v.* RUCKMAN..... 68

—————— Explanation of Contract—Rescission—Construction.... 290

See CONTRACT.

—————— Fraud—Credibility—Principal and Agent..... 227

See PRINCIPAL AND AGENT.

2. ——————*Evidence—Grounds of Objection—Error—New Trial.*] It is incumbent on a party objecting to the reception of evidence, to communicate to the Court and opposite party the nature and grounds of his objection, to entitle himself to a new trial for an error in overruling such objection.

FOUNTAIN *v.* PETTEE..... 241

PAGE

——— Inference—Commissions of Broker ..... 320
See COMMISSIONS..
——— Mental Capacity—Donatio Causa Mortis—Sufficiency of Execution ..... 53
See DONATIO.
3. ——— *Expert—Opinion—Claim against the Government.*] In an action to recover for services rendered in procuring the adjustment of claims against the Government of the United States, it is competent to prove by a competent witness, what, in his opinion, the services rendered were worth.
HOXIE *v.* ALLEN ..... 223
——— PAROL—Contract—Case on Appeal—Findings of Fact 44
See CONTRACT. 3.
——— Contract—Explanation ..... 257
See CONTRACT. 4.
——— Contract—Nonsuit ..... 196
See CONTRACT. 5.
——— OF TITLE—License—User of Way ..... 231
See TRESSPASS..
——— Void Mortgage—Personal Property—Mortgagee—Executory Contract ..... 335
EXECUTION AGAINST THE PERSON—Trover and Conversion—Judgment—Escape—Defences—Allegations of Answer ..... 203
See ESCAPE.
——— SUFFICIENCY OF—Donatio Mortis Causa—Mental Capacity—Evidence ..... 53
See DONATIO.
EXECUTORY CONTRACT—Personal Property—Mortgagee—Void Mortgage—Evidence ..... 335
See PERSONAL PROPERTY.
EXPLANATION OF CONTRACT—Evidence—Rescission—Construction ..... 290
See CONTRACT.
——— Parol Evidence ..... 257
See CONTRACT. 4.

F

FACT, FINDINGS OF—Case on Appeal—Contract—Parol Evidence 44
See CONTRACT.
——— Referee's Report—Variance—Grant—Reservation—Rent—Re-entry ..... 150
See GRANT.
FINDINGS OF FACT—Case on Appeal—Contract—Parol Evidence 44
See CONTRACT. 3.
——— Referee's Report—Variance—Grant—Reservation—Rent—Re-entry ..... 150
See GRANT.
FORECLOSURE—Judgment—Report of Sale—Interlocutory Judgment ..... 1
See JUDGMENT.

PAGE

FOREIGN CORPORATION—Eminent Domain—Retroactive Legislation—Unconstitutionality ..... 266
See EMINENT DOMAIN.
——————— Trustees—Commissions—Custody ..... 129
See TRUSTEES.
FORFEITURE—Breach of Lease—Ejectment ..... 296
See EJECTMENT.
FRAUD—Conveyance—Resulting Trust—Notice to Purchaser ..... 346
See CONVEYANCE.
——— Evidence—Credibility—Principal and Agent ..... 227
See PRINCIPAL AND AGENT.
——— Recission of Contract—Evidence—Explanation ..... 290
See CONTRACT.
——— STATUTE OF—Principal and Surety—Contract—Entire Performances ..... 94
See STATUTE OF FRAUDS.
——— Vendor—Bonâ Fide Purchaser—Delivery—Contract—Divisibility ..... 207
See VENDOR.
FREIGHT—DELIVERY OF—Common Carrier—Bailment—Negligence of Bailee ..... 311
See BAILMENT.
————— MONEY—Contract—Insurance—Loss in Transitu—Rights of Carrier ..... 69
See CONTRACT. 2.
————— TRAINS, RIDING ON—Rights of Passengers ..... 248
See NEGLIGENCE.

G

GOODS AND CHATTELS—*Vendor—Possession—Warrantee.*] Where the vendor is not in possession, a sale of a chatted is, in effect, an agreement to sell, and no warrantee of title is to be implied.
SCRANTON *v.* CLARK ..... 132
GOVERNMENT, CLAIM AGAINST—Opinion of Witness ..... 223
See EVIDENCE. 3.
GRANT—*Reservation—Rent—Re-entry—Party in Interest—Referee's Report—Findings of Fact—Variance.*] Where lands are granted in fee with a reservation to the grantor, his heirs and assigns, of a yearly rent, with covenants by the grantee for the payment of such rent, and a right to the grantor, his heirs and assigns, to re-enter upon breach of such covenant, the condition is valid; the covenant runs with the land; the devisee of the grantor is entitled to enforce the covenant and avail himself of the condition against the grantee; or against his assignee, by an action on the covenant, or by an entry and ejectment for breach of the condition. These rights are not inconsistent with the general proposition, that the tenure of all lands in the State of New York is of the State, as that proposition is stated in Van Rensselaer *v.* Dennison (35 N. Y. 393).
Where in such case the devisee of the grantor brought ejectment

PAGE

against the assignee of the grantee in possession, and it appeared that before the commencement of the action the Plaintiff had made an executory contract for the sale of the rents reserved in the grant, and the covenants, etc., therein, and the indentures, etc., relating thereto, to be conveyed upon certain several future payments by the purchaser, and in default of payment the prior payments to be forfeited and the Plaintiff to be released thereby from performance, but until default the purchaser to be at liberty to collect all rents in arrear—Held, that the Plaintiff was nevertheless the real party in interest, and could maintain the action.

Whether an objection that the purchaser should have joined as Plaintiff, if taken in the answer, would have been sustained—Quære?

A conveyance by the Plaintiff pendente lite, although made in pursuance of such executory agreement, does not take effect by relation to the date of the agreement so as to defeat the action.

Where a referee, after finding all the facts above adverted to, and a breach of the condition of the grant by non-payment of the rent, and that the Plaintiff, by reason of such breach, is entitled to recover the land, and that the estate of the Plaintiff therein, by reason of such breach and his re-entry, is an estate in fee, inserts in the case containing all the evidence, a finding or conclusion, "that the Defendant was, at the commencement of the action, and had been for years prior thereto, the owner in fee of the said premises, and held them immediately of the State, and that the contract upon which the action is brought was one of the assignments by means whereof the title came to the Defendant, and that the Plaintiff had, when the action was commenced, no estate or interest in the premises"—such conclusion must be disregarded, as in conflict with the law, inconsistent with the facts found and with the conclusion of the referee upon the whole case, that the Plaintiff is entitled to recover.

VAN RENSSELAER *v.* BARRINGER ..... 150

GRANTORS, DIRECTORS AS—Corporation—Limitation of Action 146

See CORPORATION.

GROUNDS OF OBJECTION—Evidence—Error—New trial ..... 241

See EVIDENCE. 2.

H

HEALTH BILL, METROPOLITAN—Constitutionality—Divisions of State—Judicial Powers ..... 170

See METROPOLITAN HEALTH BILL.

HUSBAND AND WIFE—*Malicious Prosecution—Personal Liability of Wife.*] In a malicious prosecution instituted by the husband and wife, the wife will not be personally liable, if she acted in the matter only by the direction and in the presence of her husband.

In an action against husband and wife for a malicious prosecution, it is competent to prove by the husband that the wife acted by his direction and in his presence only, in the matter.

CASSIN *v.* DELANY ..... 193

PAGE

I

IMPROVEMENTS—Ejectment—Deed—Condition—Incumbrance .. 329
See DEED.
INCUMBRANCE—Deed—Condition—Ejectment—Improvements .. 329
See DEED.
INDICTMENT—*Counts—Election—Evidence—Conversation with Deceased.*] Where the indictment charging the prisoner with murder alleges, in several counts, different modes of committing the murder, the people are not put to an election upon which count they will proceed to try the prisoner, where the several counts are inserted in good faith, for the purpose of meeting a single charge.

Conversation between witness and prisoner's wife, held in a room adjoining the one where the prisoner was, although the door between the rooms be open, is inadmissible.

LANERGAN *v.* THE PEOPLE ..... 84

——————— *Murder—Degrees—Name of Criminal.*] An indictment for murder in the common law form, charging the killing with malice aforethought, is good, notwithstanding our statute has divided the crime of murder into different degrees; and a conviction as charged is a conviction of murder in the first degree.

The statute is not a rule of pleading, but a guide to the conduct of the trial, prescribing the proofs requisite to a conviction.

Charging the killing of T. H., alias T. J., is not defective for uncertainty, nor duplicity. That expression does not import a killing of "either T. H. or T. J.," but a killing of T. H., otherwise called or known as T. J. The omission of the other Latin word "dictus" is not material.

On a trial for murder it is competent to prove that the deceased had money in his possession shortly before his death. How far back the inquiry should extend will depend upon the circumstances, which may render it more or less probable that the deceased retained it in his possession.

But declarations of the deceased, some weeks before his death, that he had no money, are not admissible as proof of that fact.

The form, nature, extent, depth, length, width, and direction of the fatal wounds, with their precise location on the head, the amount of force requisite to produce them, and the probable shape of the instrument, being proved, it is not competent to receive the opinion of the surgeon as to the probable position of the deceased when the blows were received. Surgeons are not presumed to be experts in the mattter of giving or receiving such blows, and the jury are equally capable of drawing the proper inferences from the facts proved, if material.

But where it was conceded throughout the trial that a wilful and deliberate murder had been committed, the admission of such an opinion furnishes no ground for the reversal of the judgment, it having no possible bearing on the question whether the prisoner was the perpetrator—the only question in fact contested.

KENNEDY *v.* THE PEOPLE ..... 19

PAGE

INFERENCE—Evidence, Commissions—Broker ..... 320
See COMMISSIONS.

INSURANCE, ASSIGNMENT OF POLICY—*Consent of Insurer.*]
To take advantage of the want of authority on the part of one assuming to act as agent for another, on the trial of a cause involving the question of authority, the defect or want of authority must be so pointed out that the other party may have notice of the defect he is called upon to supply.
When no such exception has been taken on the trial, the question of authority cannot be raised on appeal to this Court.
The condition in a policy of insurance, avoiding the policy if the property insured is sold without the consent of the underwriters, does not apply to a stock of goods kept for sale.
WOLF *v.* THE SECURITY FIRE INS. CO. ..... 286

2. ———— *Condition of Policy—Cause of Action—Limitation.*]
Where there is a condition in the policy of insurance that no suit or action shall be maintainable against the company for any losses, etc., unless such suit, etc., be commenced within six months after such loss, etc., shall have occurred.
*Held,* that the six months' limitation commenced to run at the time the Plaintiff could have commenced his action to recover for his loss.
*Held,* that although the loss occurred on the 15th of Oct., 1858, the action was reasonably commenced on the 16th day of April, 1859.
THE MAYOR, &C., *v.* HAMILTON FIRE INS. CO. ..... 244

———— Freight Money—Contract—Loss in Transitu—Rights of Carrier ..... 69
See CONTRACT. 2.

3. ————*Policy—Condition—Survey.* A paper purporting to be a survey of premises for the purpose of insurance, which was made out as a private memorandum of the insurance agent, after the delivery of the policy to the insured, is inoperative as affecting the policy of insurance.
LEROY *v.* THE PARK FIRE INS. CO. ..... 316

INSURER, CONSENT OF—Assignment of Policy of Insurance ... 286
See INSURANCE.

INTEREST, PARTY IN—Grant—Reservation—Rent—Re-entry—Referee's Report—Findings—Variance ..... 150
See GRANT.

INTERLOCUTORY JUDGMENT—Foreclosure ..... 1
See JUDGMENT.

J

JUDGMENT—*Foreclosure—Report of Sale—Interlocutory Judgment.*] A judgment is not to be deemed interlocutory where nothing thereafter remains to be judicially determined, but it is to be deemed to be final.
The time within which an appeal must be taken, must be reckoned from the date of said judgment.
MORRIS *v.* MORANGE ..... 1

PAGE

——— INTERLOCUTORY—Foreclosure ..... 1
See JUDGMENT.

JUDGMENT—Tort Contract—Assignment—Set-off ..... 253
See SET-OFF.

———Trover and Conversion—Execution against the Person—Escape—Defences—Allegations of Answer ..... 203
See ESCAPE.

JUDICIAL POWERS—Metropolitan Health Bill—Constitutionality—Divisions of State ..... 170

JURISDICTION, ADMIRALTY—Lien on Vessels—Statute of 1862—Unconstitutionality ..... 5
See LIEN ON VESSELS.

JURY—Peremptory Challenge of, does not apply to Summary Proceedings—Certiorari ..... 219
See SUMMARY PROCEEDINGS.

———QUESTION FOR—Contributory Negligence—Nonsuit..... 35
See CONTRIBUTORY NEGLIGENCE.

L

LAWS—Local—Tax Levy of 1867—Title ..... 90
See LOCAL LAWS.

LEASE—Breach—Forfeiture—Ejectment ..... 296
See EJECTMENT.

LEAVE TO PLEAD—Complaint—Demurrer—Proper Parties .... 193
See COMPLAINT.

LEGISLATION, RETROACTIVE—Unconstitutionality—Eminent Domain—Foreign Corporation ..... 266
See EMINENT DOMAIN.

LICENSE—User of Way—License—Parol Evidence of Title ..... 231
See TRESPASS.

LIEN ON VESSELS—*Statute of 1862—Admiralty Jurisdiction—Unconstitutionality.*] A proceeding against a steamer by name, authorized by the statute of 1862, is a proceeding in the nature, with all the incidents, of a suit in admiralty.

The characteristic feature of proceedings under this statute is, that it is a proceeding against the vessel itself, in which it is seized and impleaded as the Defendant, and is adjudged and sentenced accordingly.

IN THE MATTER OF BIRD *v.* STEAMBOAT JOSEPHINE ..... 5

LIMITATION OF ACTION—Corporation—Directors as Grantors.. 146
See CORPORATION.

——— CAUSE OF ACTION—Policy of Insurance—Conditions ..... 244
See INSURANCE.

LOCAL LAWS—*Tax Levy of 1867—Title.*] Section 8 of chap. 586, of Laws of 1867, is local in its character, and comes within the prohibition of art, 3d, section 16, of the Constitution.

Section 8 of the above Act, so far as it relates to the term of office of Councilmen in the city of New York, is local in its character.

PEOPLE *v.* O'BRIEN ..... 90

PAGE

LOSS IN TRANSITU—Rights of Carrier—Freight Money—Contract—Insurance ..... 69
See CONTRACT. 2.

M

MEASURE OF DAMAGES—Contract—Specific Performance—Waste 100
See CONTRACT. 6.

——————— *Warrantee—Breach—Natural Consequences.* In an action for a breach of warrantee that the article sold (as brick-dust) is of a particular quality (free from soft-dust) and fit for the use for which it was purchased (the making of brick), the rule of damage includes all damage which is the natural consequence of such breach. Thus, if, by containing soft-dust the brick were injured or destroyed, their value would be included in the damage.
MILBURN *v.* BELLONI ..... 342

MENTAL CAPACITY—Donatio Causa Mortis—Evidence—Sufficiency of Execution ..... 52
See DONATIO.

METROPOLITAN HEALTH BILL—*Constitutionality—Divisions of State—Judicial Powers.*] The act of 1866, ch. 74, creating "The Metropolitan Sanitary District of the State of New York," is constitutional.

The Legislature have the power to establish new civil divisions of the State, embracing the whole or parts of different countries, and when so established, section two, article ten, of the State Constitution, is not applicable to such divisions. The People *v.* Draper (15 N. Y. 532), affirmed and approved.

Neither is the act referred to in violation of that provision of the Constitution which declares that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolable forever," nor of that article which provides that "no person shall be deprived of life, liberty or property, without due process of law." No property or person is injured by this act.

A jury had not been the ordinary tribunal to determine upon questions affecting the public health, prior to the adoption of the Constitution of 1846.

The power to be exercised by the board upon the subjects in question, is administrative rather than judicial in its character.
THE METROPOLITAN BOARD OF HEALTH *v.* HEISTER ..... 170

MINUTES OF CLERK—Evidence—Testimony—Question—Responsiveness ..... 62
See TESTIMONY.

MONEY FREIGHT—Contract—Insurance—Loss in Transitu—Rights of Carrier ..... 69
See CONTRACT.

MORTGAGE—*Validity—Usurious Agreement.* Where Plaintiff takes an assignment of a bond and mortgage given for four thousand dollars, and on which three thousand dollars had been advanced by the mortgagee, and pays for the same, to the mortgagee, said sum of three thousand dollars, and by a usurious agreement

PAGE

agrees to advance the remaining one thousand dollars—*Held,* that the usurious agreement did not extend to the three thousand paid to the original mortgagee for the mortgage, and that the assignee could maintain his action to foreclose said mortgage to the extent of the three thousand dollars.

KELLOGG *v.* ADAMS ..... 282

MORTGAGE, VOID—Personal property—Mortgagee—Executory—Contract—Evidence ..... 335

See PERSONAL PROPERTY.

MORTGAGEE—Personal property—Executory Contract—Void Mortgage—Evidence ..... 335

See PERSONAL PROPERTY.

MURDER—Indictment—Degree—Name of Criminal ..... 19

See INDICTMENT. 2.

N

NAME OF CRIMINAL—Indictment—Murder—Degrees ..... 19

See INDICTMENT. 2.

NATURAL CONSEQUENCE—Warrantee—Breach—Measure of Damages ..... 343

See MEASURE OF DAMAGES.

NEGLIGENCE, CONTRIBUTORY—Question for Jury—Nonsuit..... 35

See CONTRIBUTORY NEGLIGENCE.

——————OF BAILEE—Bailment—Common Carrier—Delivery of Freight ..... 311

See BAILMENT.

—————— *Presumption—Rights of Passengers Riding on Freight Trains.*] Although the caboose attached to a freight train is not designed for the carrying of passengers, yet if the company use it for that purpose, and take fare from the passengers carried, they incur the same responsibilities as in the use of regular passenger cars.

EDGERTON *v.* NEW YORK & HARLEM R. R. CO. ..... 248

NEW TRIAL—Error—Evidence—Grounds of Objection ..... 241

See EVIDENCE. 2.

NONSUIT—Contract—Parol Evidence ..... 196

—————— Contributory Negligence—Question for Jury ..... 35

See CONTRIBUTORY NEGLIGENCE.

NOTE, PROMISSORY—Consideration—Surrender of Old Note .. 302

See PROMISSORY NOTE.

2. ——————— Endorser—Specified Residence—Protest—Notice ..... 159

See PROMISSORY NOTE. 2.

——— SURRENDER OF OLD—Consideration—Promissory Note .. 302

See PROMISSORY NOTE.

NOTICE—Protest—Promissory Note—Endorser—Specified Residence ..... 159

See PROMISSORY NOTE. 2.

—————— TO PURCHASER—Conveyance—Fraud—Resulting Trust ..... 346

See CONVEYANCE.

PAGE

O

OBJECTION, GROUNDS OF—Evidence—Error—New Trial ..... 241
See EVIDENCE. 2.
OLD NOTE, SURRENDER OF—Consideration—Promissory Note. 302
See PROMISSORY NOTE.
OPINION OF WITNESS—Evidence—Claim against the Government ..... 223
See EVIDENCE. 3.

P

PAROL EVIDENCE—Contract—Case of Appeal—Findings of Fact 44
See CONTRACT. 3.
——————— Contract—Explanation ..... 257
See CONTRACT. 4.
——————— Contract—Nonsuit ..... 196
See CONTRACT. 5.
——————— OF TITLE—Trespass—User of Way—License 231
See TRESPASS.
PART PERFORMANCE—Contract—Complaint—Dismissal ..... 168
See COMPLAINT. 2.
PARTIES, PROPER—Demurrer—Complaint—Leave to Plead .... 193
See COMPLAINT.
PARTY IN INTEREST—Grant—Reservation—Rent—Re-entry—Referee's Report—Findings—Variance ..... 150
See GRANT.
PASSENGERS, RIGHTS OF, RIDING ON FREIGHT TRAINS. 248
See NEGLIGENCE.
PEREMPTORY CHALLENGE OF JURY, Parties not entitled to in Summary Proceedings—Certiorari ..... 219
See SUMMARY PROCEEDINGS.
PERFORMANCE, ENTIRE—Contract—Statute of Frauds—Principal and Surety ..... 94
See STATUTE OF FRAUDS.
——————— PART—Contract—Complaint—Dismissal ..... 168
See COMPLAINT. 2.
——————— SPECIFIC—Contract—Waste—Measure of Damages ..... 100
See CONTRACT. 6.
PERSON, EXECUTION AGAINST THE—Trover and Conversion Judgment—Escape—Defences—Allegations of Answer ..... 203
See ESCAPE.
PERSONAL PROPERTY—*Mortgagee—Executory Contract—Void Mortgage—Evidence.*] A party in possession of personal property, having an interest therein as mortgagee, may maintain trespass or replevin therefor against one who wrongfully levies thereon and deprives him of such possession, notwithstanding he has made an executory contract for a sale thereof to another; the possession of the Plaintiff and his lien for the price, are sufficient to entitle him to maintain the action. It is no defence to such an action that the Plaintiff (being mortgagee, and entitled by the terms of his mortgage to possession on default of payment by the mort-

PAGE

gagor) obtains the possession by the act of one claimed to be the joint agent of the mortgagor and mortgagee without the consent of the former.

The admission of evidence in its nature incompetent, is no sufficient reason for the reversal of a judgment for the Plaintiff when it is entirely clear that without that evidence the Plaintiff was entitled to a peremptory instruction to the jury to find the fact in the Plaintiff's favor which such improper evidence was offered to prove.

A mortgage made in another State, to secure the payment of money in that State, upon personal property in that State, and made between parties residing in that State, if void by the laws of that State, is void here, and must be so declared.

When, therefore, the Plaintiff in an action of trespass de bonis asportatis relied upon his title to the property as mortgagee under a mortgage made in Pennsylvania which was not accompanied by a change of the possession of the property, and it was testified on the trial that, by the law of Pennsylvania, such a mortgage is fraudulent and void, and such evidence is in nowise contradicted, nor the witness impeached, it is error to charge the jury, peremptorily, that the "mortgage is a valid mortgage." Whatever, under the special circumstances, the law of New York may be, our Courts cannot assume to know, judicially, that the rule stated by the witness is subject to qualifications under which the mortgage might be sustained.

WATSON *v.* CAMPBELL ..... 335

PLEAD, LEAVE TO—Demurrer—Complaint—Proper Parties .... 193

See COMPLAINT.

PLEADING—*Demurrer—Alien Enemy—Rebellion.*] The same reasons making it improper for an alien enemy to be capable of maintaining actions in our Courts, apply to any other kind of enemy adhering to an organized force which is prosecuting a war against the Government.

A citizen of the United States adhering to the forces of the rebels in their war upon the United States, is under the disabilities of an alien enemy.

SANDERSON *v.* MORGAN ..... 308

POLICY OF INSURANCE—Assignment of—Consent of Insurer.. 286

See INSURANCE.

——————— Conditions—Limitations of Cause of Action ..... 244

See INSURANCE. 2.

———————Condition—Survey ..... 316

See INSURANCE. 3.

POSSESSION—Goods and Chattels—Vendor—Possession—Warrantee ..... 132

See GOODS AND CHATTELS.

POWERS, JUDICIAL—Metropolitan Health Bill—Constitutionality —Divisions of State ..... 170

See METROPOLITAN HEALTH BILL.

PAGE

PRESUMPTIVE NEGLIGENCE—Rights of Passengers—Freight Trains ..... 248
See NEGLIGENCE.

PRINCIPAL AND AGENT—*Fraud—Evidence—Credibility.* Where there is any evidence to sustain the verdict of the jury, or the finding of the referee, this Court cannot review his or their determination.
McCABE *v.* BRAYTON ..... 227

PRINCIPAL AND SURETY—Contract—Statute of Frauds—Entire Performance ..... 94
See STATUTE OF FRAUDS.

PROCEEDINGS, SUMMARY—Jury—Peremptory Challenge—Certiorari ..... 219
See SUMMARY PROCEEDINGS.

PROMISE TO ACCEPT—Draft—Authority ..... 138
See DRAFT.

PROMISSORY NOTE—*Consideration—Surrender of Old Note.*] The existence of a prior note, and the fact that the note in suit was given for the renewal of such prior note, is sufficient evidence of a consideration for the latter note, and it is to be presumed that the prior note was given up, in the absence of evidence to the contrary.

The giving of such note as a renewal, is a payment of the former note, and an extinguishment of all liability for the same.
THE HATTERS' BANK *v.* PHILLIPS ..... 302

——————— *Endorser—Specified Residence—Protest—Notice.*] When the endorser of a promissory note, made and payable in the city of New York, at the time of such endorsement, adds to his name a designation of his residence (e. g., 214 E. 18th st.) where he continues to reside, notice of protest of the note, if deposited in the post-office, must, in order to charge him, be addressed to him at that place; otherwise, if he do not receive the notice, he will not be liable as endorser.

An endorser has a right to designate the place to which notice of protest shall be sent, and such direction must be observed, or he will not, if he do not receive notice, be charged.

The statute of 1857, which in certain cases authorizes the service of notice of protest on the endorser, by depositing it in the post-office of the city or town in which he resides, "directed to him at such city or town," was not intended to abridge the right of the endorser to make such designation of a place within such city or town to which notice might be addressed, and his designation must be observed.
BARTLETT *v.* ROBINSON ..... 159

PROPER PARTIES—Complaint—Demurrer—Leave to Plead ..... 193
See COMPLAINT.

PROPERTY, PERSONAL—Mortgagee—Executory Contract—Void Mortgage—Evidence ..... 335
See PERSONAL PROPERTY.

PAGE

PROTEST—Promissory Note—Notice—Endorser—Specified Residence ..... 159
See PROMISSORY NOTE. 2.

PURCHASER, BONA FIDE—Vendor—Fraud—Delivery—Contract—Divisibility ..... 207
See VENDOR.

——— NOTICE TO—Conveyance—Fraud—Resulting Trust.. 346
See CONVEYANCE.

Q

QUESTION FOR JURY—Contributory Negligence—Nonsuit ..... 35
See CONTRIBUTORY NEGLIGENCE.

——— Responsiveness—Testimony—Evidence—Clerk's Minutes 65
See TESTIMONY.

R

REAL ESTATE—Corporations—Capital—Taxation—Statute—Certiorari ..... 116
See CORPORATION. 2.

REBELLION—Alien Enemy—Pleading—Demurrer ..... 308
See PLEADING.

REFEREE'S REPORT—Findings of Fact—Variance—Grant—Reservation—Rent—Re-entry ..... 150
See GRANT.

RENT—Reservation in Grant—Re-entry—Party in Interest—Referee's Report—Findings—Variance ..... 150
See GRANT.

REPLEVIN—*Copartnership—Bailee of one Copartner.*] While one member of a partnership firm cannot replevy the property of the firm from the bailee of another member of the firm, if the pleadings admit the property replevied to be in the Plaintiff, by a failure of the answer to deny the allegation in the complaint, that the goods were the goods of the Plaintiff, and the fact that Defendant holds as bailee of a member of the firm is not stated in the answer, such a defence cannot be made available.
TILL *v.* BEYER ..... 142

REPORT OF REFEREE—Findings of Fact—Variance—Grant—Reservation—Rent—Re-entry—Party in interest ..... 150
See GRANT.

RECISSION OF CONTRACT—Fraud—Construction—Evidence—Explanation ..... 290
See CONTRACT.

RESERVATION IN GRANT—Rent—Re-entry—Party in Interest—Referee's Report—Findings—Variance ..... 150
See GRANT.

RESIDENCE SPECIFIED—Endorser—Promissory Note—Protest—Notice ..... 159
See PROMISSORY NOTE. 2.

PAGE

RESPONSIVENESS—Question—Testimony — Evidence — Clerk's Minutes ..... 65
See TESTIMONY.

RESULTING TRUST—Conveyance—Fraud—Notice to Purchaser.. 346
See CONVEYANCE.

RETROACTIVE LEGISLATION—Unconstitutionality—Eminent Domain—Foreign Corporation ..... 266
See EMINENT DOMAIN.

RIDING ON FREIGHT TRAINS—Rights of Passengers ..... 686
See NEGLIGENCE.

RIGHTS OF CARRIER—Loss in Transitu—Contract—Freight Money—Insurance ..... 269
See CONTRACT.

RIGHTS OF PASSENGERS—Riding on Freight trains ..... 248
See NEGLIGENCE.

S

SET-OFF—*Tort—Contract—Judgment—Assignment.*] Damages in an action for fraud in obtaining the possession of personal property cannot be set off against a claim for rent.

Where R. was prosecuting an action against C. for such damages, and C. was prosecuting an action against R. for rent, and both actions were referred to the same referee, who, on the same day, reported in favor of each Plaintiff, the Plaintiff C., before judgment was entered on either report, assigned his claim against R., and the report therefor to his attorney T., in consideration of his indebtedness at that time to T.

*Held,* that this assignment was effectual to prevent a set-off.

Judgment was, by leave of Court, afterwards entered up in the name of T., against R., after which R. entered judgment against C. and commenced this action to compel a set-off of the one judgment against the other. *Held,* that he was not entitled to the set-off.

ROBERTS *v.* CARTER ..... 253

SPECIFIC PERFORMANCE—Contract—Waste—Measure of Damages ..... 100
See CONTRACT. 6.

SPECIFIED RESIDENCE—Endorser—Promissory Note—Protest—Notice ..... 159
See PROMISSORY NOTE. 2.

STATE, DIVISION OF—Metropolitan Health Bill—Constitutionality—Judicial Powers ..... 179
See METROPOLITAN HEALTH BILL.

STATUTE—Corporations—Capital—Real Estate—Taxation—Certiorari ..... 116
See CORPORATIONS. 2.

——— OF 1860, CONSTRUCTION OF—Assignment for Benefit of Creditors—Acknowledgment ..... 323
See ASSIGNMENT.

PAGE

——— 1862—Lien on Vessels—Unconstitutionality—Admiralty Jurisdiction ..... 5
See LIEN ON VESSELS.

——— FRAUDS—*Principal and Surety—Contract—Entire Performance.*] Under the provision of the Statute of Frauds that every special promise to answer for the debt, default, or miscarriage of another person must be in writing, and be signed by the party to be charged thereby, the principal inquiry raised is whether the party sought to be charged is the *principal* debtor; or whether he is liable only in case of the default of a third party —that is, whether he undertook as principal absolutely, or as surety only.
BROWN *v.* WEBER ..... 94

SUFFICIENCY OF EXECUTION—Donatio Causa Mortis—Mental Capacity—Evidence ..... 53
See DONATIO.

SUMMARY PROCEEDINGS—*Jury—Challenge—Certiorari.*] In a summary proceeding before a Justice to dispossess a tenant holding over, the Supreme Court is authorized to review all questions properly arising in respect to the proceedings, or during the trial, on the merits of such special proceedings.
The statutory writ awarded in such case is not in the nature of a common law certiorari, limiting the reviewing Court to the question of jurisdiction or regularity of proceedings.
This proceeding is not a civil action within the meaning of the Code, and the parties thereto are not entitled to peremptory challenges.
PEOPLE EX REL. LIVERMORE *v.* HAMILTON ..... 219

SURETY AND PRINCIPAL—Statute of Frauds—Contract—Entire Performance ..... 94
See STATUTE OF FRAUDS.

SURRENDER OF OLD NOTE—Consideration—Promissory Note.. 302
See PROMISSORY NOTE.

SURVEY—Insurance—Condition of Policy ..... 316
See INSURANCE. 3.

T

TAX LEVY OF 1867—Local Laws—Title ..... 90
See LOCAL LAWS...

TAXATION—Statute—Capital—Corporations—Real Estate—Certiorari ..... 116
See CORPORATIONS. 2.

TESTIMONY—*Question—Responsiveness—Evidence—Clerk's Minutes.*] The engrossed minutes of a trial kept by the clerk of the Court are competent evidence of the beginning and end of the trial of another action, although his rough minutes, kept in Court while the trial was in progress, are destroyed.
PORTER *v.* RUCKMAN ..... 65

PAGE

TITLE OF LOCAL LAWS—Tax Levy of 1867..... 90
See LOCAL LAWS.....
——— PAROL EVIDENCE OF—License—User of Way..... 231
See TRESSPASS.
TORT CONTRACT—Judgment—Set-off—Assignm.ent..... 253
See SET-OFF.
TRESPASS—*User of Way—License—Parol Evidence of Title.*] A license to travel over the land is revocable at the pleasure of the owner of the land.

Although twenty years' user of a way over another's land may raise a presumption of right or of adverse claim, yet when it appears that the use began in mere license or indulgence, this presumption ceases, and the continued use, though for more than twenty years, will not prejudice the title of the owner.

When evidence bearing upon a material question in the cause is received on the trial in favor of the party against whom judgment is rendered, though it is in its nature incompetent, and is objected to, it must stand as evidence in the cause for all the purposes of a review of the case on his appeal from the judgment. The Court cannot, on appeal, disregard it. Non constat but if it
TRANSCRIPT APPEALS—Vol 6—133
had been excluded, other and competent evidence to the same facts might have been given.
FLORA *v.* CARBEAU..... 231
TROVER AND CONVERSION—Judgment—Execution against the Person—Escape—Defences—Allegations of Answer..... 203
See ESCAPE.
TRUST, RESULTING—Conveyance—Fraud—Notice to Purchaser.. 346
See CONVEYANCE.
TRUSTEES — *Commissions — Foreign Corporations — Custody.*] Where persons are appointed trustees of a foreign company to receive the transfer of title in their names, merely to hold in trust for such company, without becoming custodians of the property, they are not entitled to a commission for the mere use of their names.
OGDEN *v.* MURRAY ..... 129

U

UNCONSTITUTIONALITY OF RETROACTIVE LEGISLATION—Eminent Domain—Foreign Corporations..... 266
See EMINENT DOMAIN..
——————— Statute of 1862---Lien on Vessels---Admiralty Jurisdiction..... 5
See LIEN ON VESSELS.
USER OF WAY—License—Trepass—Parol Evidence of Title..... 231
See TRESPASS..
USURIOUS AGREEMENT—Validity of Mortgage..... 282
See MORTGAGE.

PAGE

V

VALIDITY OF MORTGAGE—Usurious Agreement..... 282
See MORTGAGE.

VARIANCE—Findings of Fact—Referee's Report—Grant—Reservation—Rent—Re-entry ..... 150
See GRANT.

VENDOR—*Contract—Divisibility—Fraud—Bonâ Fide Purchaser—Delivery.*] A party who has acquired possession of property by means, as between him and his vendor, which would render his title invalid, may, nevertheless, impart a good title to a bonâ fide purchaser from him.

A contract for the delivery of two cargos of wheat, although entire in form, may be divisible at the option of the parties; and when they have treated it as divisible, in requiring payment when one cargo has been delivered, &c., it will be deemed to be divisible.

WINNE *v.* MACDONALD..... 207

———— Goods and Chattels—Possession—Warrantee..... 132
See GOODS AND CHATTELS.

VESSELS, LIEN ON—Statute of 1862—Admiralty Jurisdiction—Unconstitutionality ..... 5
See LIEN ON VESSELS.

VOID MORTGAGE—Personal Property—Mortgagee—Executory Contract—Evidence ..... 335
See PERSONAL PROPERTY.

W

WARRANTEE—Breach—Natural Consequences—Measure of Damages ..... 343
See MEASURE OF DAMAGES.

———— Goods and Chattels—Vendor—Possession—Warrantee ..... 132
See GOODS AND CHATTELS.

WASTE—Measure of Damages—Contract—Specific Performance... 100
See CONTRACT. 6.

WAY, USER OF—License—Trespass—Parol Evidence of Title..... 231
See TRESPASS.

WITNESS, OPINION OF—Evidence—Claim against the Government ..... 223
See EVIDENCE. 3.

E.A.P.N.
8/20/31

4037 029

HARVARD LAW LIBRARY